

EXHIBIT 7

GREENBAUM, ROWE, SMITH & DAVIS LLP

COUNSELORS AT LAW

METRO CORPORATE CAMPUS ONE
PO. BOX 5600
WOODBIDGE, N.J. 07095-0988
(732) 549-5600
FAX (732) 549-1881

DELIVERY ADDRESS:

99 WOOD AVE. SOUTH
ISELIN, NEW JERSEY 08830-2712

6 BECKER FARM RD.
ROSELAND, NEW JERSEY 07068-1735
(973) 535-1600
FAX (973) 535-1698

EMAIL: INFO@GREENBAUMLAW.COM
WWW.GREENBAUMLAW.COM

May 12, 2006

ROBERT S. GREENBAUM
ARTHUR H. GREENBAUM
PAUL A. ROWE
WENDELL A. SMITH
ALAN E. DAVIS
DAVID L. BRUCK
MICHAEL A. BACKER
MARTIN E. DOLLINGER
DEAN A. GAVEN
ROBERT C. SCHACHTER
MARTIN L. LEPELSTAT
DENNIS A. ESTIS
WILLIAM D. GRABO
ALAN S. HARR
STEPHEN H. KNEE
ROBERT H. GOODMAN
DOUGLAS K. WOLFSON
MARK H. SOBEL
HAL W. MANDEL
BARRY S. GOODMAN
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THOMAS J. DENTZIO, JR.
ROBERT S. GOLDSMITH
JOHN D. NORTH
KENNETH T. BILLS

THOMAS C. SENTER
MARGARET GOODZEIT
W. RAYMOND FELTON
CHRISTINE F. LI
HERYL A. G. GORCHAN
MICHAEL K. FEINBERG
CARLTON T. SPILLER
JOSEPH W. ORIOLO
ARON H. SCHWARTZ
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STEVEN C. DELINKO
GARY K. WOLJNETZ
KEVIN T. MCNAMARA
RICHARD L. HERTZBERG
ELLEN A. SILVER
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MARC J. GROSS
LUKE J. KEALY
C. BRIAN KORNBERG
CIPORA S. WINTERS
CALIT RIERRUT
BRIAN R. SELVIN
PETER D. CRAWFORD, JR.

OF COUNSEL
FRANKLIN M. SACHS
J. WARREN WOOD III

COUNSEL

CHRISTINE F. MARKS
ROBERT S. UNDERHILL
STEVEN FIRKSER
ALLEN V. BROWN

HOWARD B. HANDEK
LORA L. FONG
KEVIN J. CONNELL

MICHELE GIBSON
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SERWAN AKHTAR
BRYAN D. FLOCKER
DAVID T. SHIVAS

DAVID S. SCHECHTER
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JONATHAN J. WALZMAN
MARJORIE E. KLEIN
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JENI H. GOULIAN
JOHN B. HAYCE
MICHELLE M. SEKOWSKI
JEFFREY A. SIROT
JOHN WHITING ROESER
MICHAEL A. GOROKHOVICH
LISA J. CLAPP
CHERYL WABEL
LISA B. DIPASQUA
MEGHAN O. MURRAY
ERNEST E. D'ANGELO
JORDAN A. STERN
LAURA H. BLOTTA
MICHAEL RINGER
JAMIE A. YONKS
JEANETTE TANNER

WM. L. GREENBAUM (1914-1983)
ALLEN RAVIN (1957-1997)

REPLY TO:

VIA FACSIMILE and REGULAR MAIL

Mr. Jack Chapman
Associate Director Corporate Real Estate
Bristol-Myers Squibb Company
Post Office Box 4000
Princeton, New Jersey 08845-4000

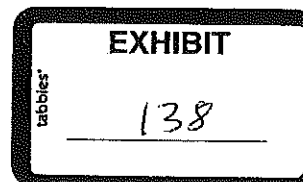
RE: Lease dated October 23, 1987 between Somerville Fidelco Associates, L.P., as Landlord, and Bristol-Myers Squibb Company, as Tenant, as further amended by Lease Extension Agreement No. 1 dated May 14, 1993 and Lease Extension Agreement No. 2 dated November 25, 2002 (the "Lease")

Dear Mr. Chapman:

Please be advised that I represent Somerville Fidelco Associates, L.P. I have reviewed the file in connection with this matter, the Lease between my client and yourselves, and your March 24, 2006 letter to Mr. Jeffrey Persky. Suffice it to say, we are surprised by the position seemingly asserted by yourselves. The delays and resulting costs incurred by Bristol-Myers Squibb were the result of requirements imposed upon the Landlord by Bristol-Myers, which unnecessarily delayed completion of the roof membrane and added to the cost of the job. The reasonableness of those requests is open to serious question.

Without getting into specifics, it seems apparent that any materials that may have been dislodged originated beneath the underside of the decking. Therefore, they could not be coming from the old roof membrane which was being replaced. The structural integrity of the deck system, which supported the membrane, was never compromised. The new roof was placed on top of the existing decking. Even if, for the sake of argument, the materials consisted in part of roof membrane debris, any asbestos, to the extent it existed, was non-friable and the system being employed to remove the membrane was one that did not require governmental oversight.

805800.02 5/12/2006 11:20 AM



BMS01669

GREENBAUM, ROWE, SMITH & DAVIS LLP

Mr. Jack Chapman
May 12, 2006
Page 2 of 2

Furthermore, and notwithstanding any of the above, the Lease, at Sections 5.1 and 29.1, precludes any claim related to the Landlord's actions that, under the circumstances, occurred.

Finally, may I call your attention to the fact that pursuant to Section 5.1 of the Lease, the clear responsibility for, and cost of, replacing the roof membrane belonged to the Tenant. The Landlord's obligations relate only to the "structure," which does not include the roof membrane, but only the roof decking.

Consequently, I have been advised to notify you that the Landlord rejects your request for compensation and as well specifically reserves the right to backcharge Bristol-Myers for the total cost of replacing the roof membrane, inclusive of all of the added costs generated by the delays imposed upon the Landlord by Bristol-Myers.

Very truly yours,



Martin E. Dollinger

MED/hjb

cc: David Kahan, Esq.

EXHIBIT 8

DrinkerBiddle&Reath
A Pennsylvania Limited Liability Partnership L L P

Charles J. Vinicombe
609-716-6562
charles.vinicombe@dbr.com

Law Offices

65 College Road East
Suite 300
P.O. Box 627
Princeton, NJ
609-716-6500
609-799-7000 fax
w.drinkerbiddle.com

PHILADELPHIA

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WASHINGTON

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SAN FRANCISCO

CHICAGO

FLORHAM PARK

BERWTN

WILMINGTON

August 4, 2006

Via Federal Express

Ms. Catherine Shanks
Vice President-Case Management Center
American Arbitration Association
950 Warren Ave.
East Providence, RI 02914

Re: Bristol-Myers Squibb Company v. Somerville Fidelco Associates, L.P.

Dear Ms. Shanks:

Please find enclosed for filing with the American Arbitration Association the Arbitration Demand of Bristol-Myers Squibb Company ("BMS"). By copy of this letter, we are providing a copy of this Demand to Somerville Fidelco Associates, L.P. and its legal counsel, Mr. Dollinger. I have also enclosed a check in the amount of \$325.00 for the filing fee. I thank you for your assistance in this matter.

Sincerely yours,



Charles J. Vinicombe

CJV/sds

cc: Martin E. Dollinger, Esq. ✓
Somerville Fidelco Associates, LP
(via certified mail return receipt
requested and ordinary mail
with demand)

*Jonathan I. Epstein,
Partner responsible for
Princeton Office*

Established
1849



American Arbitration Association
Dispute Resolution Services Worldwide

COMMERCIAL ARBITRATION RULES
DEMAND FOR ARBITRATION

MEDIATION: If you would like the AAA to contact the other parties and attempt to arrange a mediation, please check this box. ☐
There is no additional administrative fee for this service.

Name of Respondent <u>Somerville Fidelco Associates, L.P.</u>			Name of Representative (if known) <u>Martin E. Dollinger</u>		
Address <u>520 U.S. Highway 22 East</u>			Name of Firm (if applicable) <u>Greenbaum, Rowe, Smith & Davis LLP</u>		
P.O. Box 6872			Representative's Address <u>Metro Corporate Center, P.O. Box 5600</u>		
City <u>Bridgewater</u>	State <u>NJ</u>	Zip Code <u>08807</u>	City <u>Woodbridge</u>	State <u>NJ</u>	Zip Code <u>07095-0988</u>
Phone No. <u>(908) 725-8100</u>		Fax No. <u>(908) 575-2237</u>	Phone No. <u>(732) 549-5600</u>		Fax No. <u>(732) 549-1881</u>
Email Address: <u>mdollinger@greenbaum.com</u>			Email Address: <u>mdollinger@greenbaum.com</u>		

The named claimant, a party to an arbitration agreement dated October 23, 1987, which provides for arbitration under the Commercial Arbitration Rules of the American Arbitration Association, hereby demands arbitration. *

THE NATURE OF THE DISPUTE

Claim for breach of commercial lease by tenant against landlord arising out of asbestos contamination at leased premises (located in Somerville, New Jersey) caused by landlord's roofing contractor

Dollar Amount of Claim \$734,175.00

Other Relief Sought: ☐ Attorneys Fees ☐ Interest
☐ Arbitration Costs ☐ Punitive/Exemplary ☐ Other

AMOUNT OF FILING FEE ENCLOSED WITH THIS DEMAND (please refer to the fee schedule in the rules for the appropriate fee) \$325.00

PLEASE DESCRIBE APPROPRIATE QUALIFICATIONS FOR ARBITRATOR(S) TO BE APPOINTED TO HEAR THIS DISPUTE:

Commercial lease experience

Hearing locale Somerville, NJ (check one) ☒ Requested by Claimant ☐ Locale provision included in the contract

Estimated time needed for hearings overall:
_____ hours or 2-3 days

Type of Business: Claimant Property owner
Respondent Pharmaceutical Company

Is this a dispute between a business and a consumer? ☐ Yes ☒ No Does this dispute arise out of an employment relationship? ☐ Yes ☒ No

If this dispute arises out of an employment relationship, what was/is the employee's annual wage range? Note: This question is required by California law. ☐ Less than \$100,000 ☐ \$100,000 - \$250,000 ☐ Over \$250,000

You are hereby notified that copies of our arbitration agreement and this demand are being filed with the American Arbitration Association's Case Management Center, located in (check one) ☐ Atlanta, GA ☐ Dallas, TX ☒ East Providence, RI ☐ Fresno, CA ☐ International Centre, NY, with a request that it commence administration of the arbitration. Under the rules, you may file an answering statement within fifteen days after notice from the AAA.

Signature (may be signed by a representative) Date:

Name of Representative

Name of Claimant

Charles J. Vinicombe

Bristol-Myers Squibb Company

Name of Firm (if applicable)

Address (to be used in connection with this case)

DRINKER BIDDLE & REATH LLP

P.O. Box 4000

Representative's Address

City

105 College Road East Suite 300

Princeton

State

City

State

Zip Code

NJ

Princeton

NJ

08542

Phone No.

Phone No.

Fax No.

(609) 252-5546

(609) 716-6562

(609) 799-7000

Email Address:

Email Address:

john.chapman@bms.com

charles.vinicombe@dbi.com

To begin proceedings, please send two copies of this Demand and the Arbitration Agreement, along with the filing fee as provided for in the Rules, to the AAA. Send the original Demand to the Respondent.

Please visit our website at www.adr.org if you would like to file this case online. AAA Customer Service can be reached at 800-778-7879

* The arbitration clause is contained in the original October 23, 1987 lease, which has amendments and extensions dated June 3, 1988, May 14, 1993 and November 25, 2002.

EXHIBIT 9

1 BEFORE THE AMERICAN ARBITRATION ASSOCIATION
2 CASE NO. 18115Y0107106

3

4 BRISTOL-MYERS SQUIBB,

5 Claimant,

6 v.

7 SOMERVILLE FIDELCO ASSOCIATES,

8 Respondent.

9

10
11 DEPOSITION UNDER ORAL EXAMINATION OF

12 MICHAEL SOLAKOV

13 Clifton, New Jersey

14 February 9, 2007

15 _____

16

17

18 REPORTED BY: MARGO HRONCICH, CSR

19

20

21

ESQUIRE DEPOSITION SERVICES

22 90 Woodbridge Center Drive

Woodbridge, New Jersey 07095

23 (732) 283-1060

24

25 JOB #59648

ESQUIRE DEPOSITION SERVICES

EXHIBIT

9

<p>2</p> <p>1 Transcript of the deposition of</p> <p>2 MICHAEL SOLAKOV, called for Oral Examination in the</p> <p>3 above-captioned matter, said deposition taken</p> <p>4 pursuant to Superior Court Rules of Practice and</p> <p>5 Procedure by and before MARGO A. HRONCICH, a</p> <p>6 Certified Shorthand Reporter and Notary Public for</p> <p>7 the State of New Jersey, at the offices of DRINKER,</p> <p>8 BIDDLE & REATH, LLP, 500 Campus Drive, Florham Park,</p> <p>9 New Jersey, on Friday, February 9, 2007, commencing</p> <p>10 at 9:50 a.m.</p> <p>11</p> <p>12 ---</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>4</p> <p>1</p> <p>2 INDEX</p> <p>3</p> <p>4</p> <p>5 Testimony of: MICHAEL SOLAKOV</p> <p>6 Direct Cross Redirect Recross</p> <p>7 By Mr. Vinicombe 6</p> <p>8 By Mr. Maher 63</p> <p>9</p> <p>10</p> <p>11</p> <p>12 EXHIBITS</p> <p>13</p> <p>14 (BMS exhibits)</p> <p>15 NO. DESCRIPTION PAGE</p> <p>16 31 Certification of Service and</p> <p>17 Subpoena Ad Testificandum and</p> <p>18 Duces Tecum served upon Slavco</p> <p>19 Construction, Inc. 12</p> <p>20</p> <p>21 32 Collection of documents produced</p> <p>22 by Slavco Construction, Inc.,</p> <p>23 facing page entitled "Job</p> <p>24 Scheduling Timeline" 15</p> <p>25</p> <p>33 Fax from Heather at Slavco</p> <p>Construction, Inc., to Scott</p> <p>Badger, dated October 20, 2005,</p> <p>w/attached Asbestos Abatement</p> <p>Proposal, Bates stamped SF00214 -</p> <p>216 21</p> <p>34 Document entitled "Work Plan &</p> <p>Schedule, 76 Fourth Street,</p> <p>Somerville, New Jersey," Bates</p> <p>stamped SF00258 39</p>
<p>3</p> <p>1 APPEARANCES:</p> <p>2</p> <p>3 DRINKER, BIDDLE & REATH, LLP</p> <p>4 BY: CHARLES J. VINICOMBE, ESQUIRE</p> <p>5 105 College Road East</p> <p>6 Suite 300</p> <p>7 Princeton, New Jersey 08452</p> <p>8 (609) 716-6562</p> <p>9 Counsel for the Claimant</p> <p>10</p> <p>11 GREENBAUM, ROWE, SMITH & DAVIS, LLP</p> <p>12 BY: LAWRENCE P. MAHER, ESQUIRE</p> <p>13 Metro Corporate Campus One</p> <p>14 P.O. Box 5600</p> <p>15 Woodbridge, New Jersey 07095</p> <p>16 (732) 549-5600</p> <p>17 Counsel for the Respondent</p> <p>18</p> <p>19 ALSO PRESENT:</p> <p>20 MARGO HRONCICH, CSR</p> <p>21 Esquire Deposition Services</p> <p>22</p> <p>23 ---</p> <p>24</p> <p>25</p>	<p>5</p> <p>1</p> <p>2 EXHIBITS (CONTINUED)</p> <p>3</p> <p>4 (BMS exhibits)</p> <p>5 NO. DESCRIPTION PAGE</p> <p>6 35 Document entitled "Procedures</p> <p>7 For The Removal Of Roofing,</p> <p>8 76 Fourth Street," Bates</p> <p>9 stamped SF00641 - 643 40</p> <p>10 36 Document entitled "Slavco</p> <p>11 Construction, Inc., Standard</p> <p>12 Operating Procedures," Bates</p> <p>13 stamped SF00001 - 192 41</p> <p>14</p> <p>15 37 Slavco Construction, Inc.,</p> <p>16 Closeout Package, Bates</p> <p>17 stamped SF00413 - 507 49</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

<p>6</p> <p>1 - - - -</p> <p>2 DEPOSITION SUPPORT INDEX</p> <p>3 - - - -</p> <p>4 Direction to Witness Not to Answer</p> <p>5 Page Line Page Line Page Line</p> <p>6 None</p> <p>7 Request for Production of Documents</p> <p>8 Page Line Page Line Page Line</p> <p>9 None</p> <p>10 Stipulations</p> <p>11 Page Line Page Line Page Line</p> <p>12 None</p> <p>13 Question Marked</p> <p>14 Page Line Page Line Page Line</p> <p>15 None</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>8</p> <p>1 finish your answer before I ask you a question, and,</p> <p>2 by the same token, if you can just wait until I've</p> <p>3 completed my question before you start answering the</p> <p>4 question.</p> <p>5 It's also important that you answer</p> <p>6 verbally and not just give a nod of the head or say</p> <p>7 "uh-huh" because the court reporter can't interpret</p> <p>8 what you mean by that.</p> <p>9 If you don't understand a question,</p> <p>10 please let me know that. I want to make sure you</p> <p>11 understand every question I ask you, so if there's</p> <p>12 some portion of it that you don't understand, let me</p> <p>13 know and I'll attempt to rephrase it in a way that</p> <p>14 you can understand it.</p> <p>15 Do you have any questions about how</p> <p>16 we're going to proceed this morning?</p> <p>17 A. No questions.</p> <p>18 Q. Where are you currently employed?</p> <p>19 A. Slavco Construction.</p> <p>20 Q. And what is your position with</p> <p>21 Slavco?</p> <p>22 A. General manager.</p> <p>23 Q. What are your duties and</p> <p>24 responsibilities as a general manager?</p> <p>25 A. To oversee all operations, every</p>
<p>7</p> <p>1 MICHAEL SOLAKOV, c/o Slavco</p> <p>2 Construction, Inc., 164 Getty Avenue, Clifton, New</p> <p>3 Jersey, 07011, called as a witness, after having</p> <p>4 been duly sworn, was examined and testified as</p> <p>5 follows:</p> <p>6 DIRECT EXAMINATION BY MR. VINICOMBE:</p> <p>7 Q. Good morning, Mr. Solakov.</p> <p>8 A. Good morning.</p> <p>9 Q. I introduced myself off the record,</p> <p>10 but let me just put on the record, my name is</p> <p>11 Charles Vinicombe. I represent Bristol-Myers</p> <p>12 Squibb. Bristol-Myers Squibb is the tenant at a</p> <p>13 facility that has brought an arbitration proceeding</p> <p>14 against the landlord, Somerville Fidelco Associates</p> <p>15 We're here this morning to take your</p> <p>16 deposition. Have you ever been deposed before?</p> <p>17 A. Yes.</p> <p>18 Q. Approximately how many times?</p> <p>19 A. A couple times.</p> <p>20 Q. Okay. Let me just go over sort of a</p> <p>21 few of the ground rules, even though some of them</p> <p>22 may be familiar to you.</p> <p>23 It's important that we not speak at</p> <p>24 the same time, otherwise it makes the court</p> <p>25 reporter's life difficult; so I will wait until you</p>	<p>9</p> <p>1 operation, from estimating to bidding, to completion</p> <p>2 of the job.</p> <p>3 Q. And how long have you been with</p> <p>4 Slavco?</p> <p>5 A. Three years.</p> <p>6 Q. What business is Slavco in? How</p> <p>7 would you describe its business?</p> <p>8 A. We're an environmental company doing</p> <p>9 from selective demolition to demolition to</p> <p>10 environmental issues, from asbestos to mercury</p> <p>11 contaminated soil.</p> <p>12 Q. Before joining Slavco, were you in</p> <p>13 the environmental field at all, in the business?</p> <p>14 A. A long time. In the late '80s, prior</p> <p>15 to Slavco, '80 to '92.</p> <p>16 Q. Who did you work for during that time</p> <p>17 period?</p> <p>18 A. My father's company.</p> <p>19 Q. What's the name of that company?</p> <p>20 A. Mace, M-a-c-e, Construction.</p> <p>21 Q. Was that also an environmental</p> <p>22 business?</p> <p>23 A. That was a construction business, but</p> <p>24 back then, that's when asbestos was coming out,</p> <p>25 lead.</p>

SOLAKOV - Direct

<p style="text-align: right;">10</p> <p>1 Q. And where did you work between '92</p> <p>2 and when you joined Slavco?</p> <p>3 A. I worked for my father's companies,</p> <p>4 either a construction company in the states, or we</p> <p>5 also resided in Europe, in the Republic of</p> <p>6 Macedonia.</p> <p>7 Q. So would it be accurate to say that</p> <p>8 since 1980 you've been in the construction and/or</p> <p>9 environmental business up through today?</p> <p>10 A. Yes.</p> <p>11 Q. Are there any certifications or</p> <p>12 licenses that you hold in the environmental business</p> <p>13 or the construction business?</p> <p>14 A. Certified asbestos supervisor in</p> <p>15 Virginia, New Jersey, New York State, Connecticut,</p> <p>16 Pennsylvania, OSHA 40-hour Haz-WOPER.</p> <p>17 Q. Forty-hour?</p> <p>18 A. H-a-z-W-O-P-E-R, Haz-WOPER. It's for</p> <p>19 hazardous materials.</p> <p>20 Q. To become a certified asbestos</p> <p>21 supervisor and to obtain those certifications in</p> <p>22 each of the states that you mentioned, what are the</p> <p>23 requirements to obtain that certification?</p> <p>24 A. A minimum of 40-hour classes that's</p> <p>25 recognized by the EPA. In New Jersey you have to</p>	<p style="text-align: right;">12</p> <p>1 A. Yes.</p> <p>2 Q. What are those?</p> <p>3 A. We are certified to perform asbestos</p> <p>4 in New Jersey, Connecticut, New York State,</p> <p>5 Pennsylvania, that's it.</p> <p>6 Q. Do you recall when Slavco obtained</p> <p>7 that certification? Did it predate your joining</p> <p>8 Slavco --</p> <p>9 A. Yes.</p> <p>10 Q. -- or was it recent?</p> <p>11 And what does that asbestos</p> <p>12 certification allow Slavco to do?</p> <p>13 A. To perform asbestos abatement in each</p> <p>14 state.</p> <p>15 Q. Do you know how long Slavco has been</p> <p>16 in business?</p> <p>17 A. Since 1992.</p> <p>18 Q. And you are here today in response to</p> <p>19 a subpoena that we served on you; is that correct?</p> <p>20 A. Yes.</p> <p>21 (Exhibit BMS-31, Certification of</p> <p>22 Service and Subpoena Ad Testificandum and Duces</p> <p>23 Tecum served upon Slavco Construction, Inc., is</p> <p>24 received and marked for Identification.)</p> <p>25 Q. Let me hand you what I've had marked</p>
<p style="text-align: right;">11</p> <p>1 follow up with the test; in other states you just --</p> <p>2 that's proof enough.</p> <p>3 Q. When did you first become a certified</p> <p>4 asbestos supervisor, and do you recall which state</p> <p>5 you first obtained that certification?</p> <p>6 A. Connecticut.</p> <p>7 Q. Do you recall what year?</p> <p>8 A. 2004.</p> <p>9 Q. When did you obtain your</p> <p>10 certification in New Jersey?</p> <p>11 A. 2004. All about in the same time,</p> <p>12 2004.</p> <p>13 Q. And the OSHA Haz-WOPER certification</p> <p>14 when did you obtain that?</p> <p>15 A. February 2005.</p> <p>16 Q. What does that allow you to do?</p> <p>17 A. Contaminated soil, PCBs, mercury, you</p> <p>18 know. If there's a hazardous spill, oil spill</p> <p>19 cleanup, we'll oversee it.</p> <p>20 Q. The certification as an asbestos</p> <p>21 supervisor, what does that qualify you to do?</p> <p>22 A. To perform asbestos work, also to</p> <p>23 supervise all asbestos work on-site.</p> <p>24 Q. Does Slavco, the business, the</p> <p>25 company, hold any certifications or licenses?</p>	<p style="text-align: right;">13</p> <p>1 as BMS-31.</p> <p>2 The first page is just a</p> <p>3 certification of service, but if you turn to the</p> <p>4 second page where the subpoena starts, do you</p> <p>5 recognize this as a subpoena that you were provided</p> <p>6 with on behalf of Slavco?</p> <p>7 A. Yes.</p> <p>8 Q. And did you have an opportunity to</p> <p>9 review the subpoena?</p> <p>10 A. Yes.</p> <p>11 Q. And did you discuss it with your</p> <p>12 supervisor at Slavco?</p> <p>13 A. Discussed it with only the owner.</p> <p>14 Q. And who is that?</p> <p>15 A. Slavco.</p> <p>16 Q. What's his first name?</p> <p>17 A. Slavco.</p> <p>18 Q. Slavco is the first name?</p> <p>19 A. Yes.</p> <p>20 Q. What's his last name?</p> <p>21 A. Madzarov, M-a-d-z-a-r-o-v.</p> <p>22 Q. I can pronounce "Slavco" better than</p> <p>23 I can his last name, so did you have a chance to</p> <p>24 review the subpoena with Slavco?</p> <p>25 A. We just glanced over it.</p>

ESQUIRE DEPOSITION SERVICES

SOLAKOV - Direct

<p style="text-align: right;">14</p> <p>1 Q. And did he ask you to appear on 2 behalf of the company in response to the subpoena -- 3 A. Yes. 4 Q. -- at this deposition? 5 A. Yes. 6 Q. Now, you'll see in the first page 7 there are a number of subject matters listed in the 8 subpoena. It has paragraph numbers 1 through 8. 9 Did you and Slavco review those 10 paragraphs and come to the conclusion that you were 11 the most knowledgeable person on those subjects -- 12 A. Yes. 13 Q. -- for this project? 14 A. Yes. 15 Q. And you'll see a little bit further 16 back on page 5, where it says "Document Request," 17 and then there's a list of paragraphs 1 through 14. 18 Did you have the opportunity to 19 review those document requests with Slavco before 20 you appeared today? 21 A. I did not review them with Slavco. I 22 just gave a brief explanation of what was needed 23 and -- you know. 24 Q. And did you collect any materials in 25 response to that subpoena?</p>	<p style="text-align: right;">16</p> <p>1 or at the end, I'll make a copy for Mr. Maher. 2 What I've marked BMS-32, we were just 3 talking about documents that you had arranged to be 4 gathered in response to the subpoena, and I've now 5 marked that as BMS-32. 6 Did you direct somebody at Slavco to 7 gather these materials for you? 8 A. I gathered a majority of them and 9 then I had the final copies made today. 10 Q. And did you review them and come to 11 the conclusion that you had gathered all the 12 materials that were responsive to the particular 13 requests that were listed in this subpoena? 14 A. Yes. 15 Q. And I see, certainly, in the first 16 page, and when we have an opportunity, I'll glance 17 through some of the other pages and see if I have 18 any questions, but essentially on the first page it 19 appears to be a list which is entitled "Job 20 Scheduling Timeline," and then it has various dates 21 and events listed to next to it, correct? 22 A. Yes. 23 Q. Is this a document you prepared to 24 refresh your recollection of the events that had 25 occurred at the site while Slavco was working there?</p>
<p style="text-align: right;">15</p> <p>1 A. Yes. 2 Q. And do you have any of those 3 materials with you today? 4 A. Yes, I have them all. 5 Q. Okay. Are those originals or an 6 extra set of copies? 7 A. I have to check. They should all be 8 copies. 9 Q. I just want to make sure I'm not 10 going to be taking your only copy from the company, 11 so that's the reason I ask. I also want to mark 12 them as well, so. 13 A. I'll double-check. 14 (Brief pause.) 15 They're all copies. 16 (There is a discussion off the 17 record.) 18 (Exhibit BMS-32, collection of 19 documents produced by Slavco Construction, Inc., 20 facing page entitled "Job Scheduling Timeline," is 21 received and marked for Identification.) 22 Q. I take it you made one copy for us, 23 correct? 24 A. Yes. 25 Q. So what I'll do when we have a break,</p>	<p style="text-align: right;">17</p> <p>1 A. I had our controller, previous 2 controller, Phyllis Jones, prepare them. 3 Q. Okay. And as we go through my 4 questions, certainly, if you need to review this 5 document to refresh your memory, feel free to do so. 6 And like I said, later on I'll go through it and if 7 I have any specific questions, I'll let you know, 8 but I want to make sure you have that available to 9 you. 10 And my understanding is that, and 11 correct me if I'm wrong, Slavco was hired to do a 12 roof removal job at 76 Fourth Street in Somerville, 13 New Jersey; is that correct? 14 A. Correct. 15 Q. And for purposes of this deposition, 16 I'll refer to that site as the Somerville facility 17 or the Somerville site, just so we both are on the 18 same page as far as what job we're talking about. 19 Is that okay? 20 A. Okay. 21 Q. Do you recall when Slavco was 22 retained to provide services at the Somerville 23 facility? 24 A. We were -- there was -- first Badger 25 Roofing called us in September to give us a price</p>

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<p style="text-align: right;">18</p> <p>1 for asbestos abatement of a roof, and we forwarded a</p> <p>2 proposal to them. Then SK Properties -- how do you</p> <p>3 call their name? What's their name?</p> <p>4 Q. SK Associates, SK Properties.</p> <p>5 A. They signed a contract. That</p> <p>6 proposal was forwarded to them and they signed a</p> <p>7 contract, or a proposal, on 10/12, 2005.</p> <p>8 Q. Do you recall who it was from Badger</p> <p>9 that had contacted your office?</p> <p>10 A. It was -- I think his last name was</p> <p>11 Badger.</p> <p>12 Q. Scott Badger?</p> <p>13 A. That's it, Scott Badger.</p> <p>14 Q. Had you known Scott Badger before</p> <p>15 that phone call was made to your office?</p> <p>16 A. No.</p> <p>17 Q. And do you know who he contacted at</p> <p>18 Slavco initially, was it you or somebody else?</p> <p>19 A. It went through our receptionist and</p> <p>20 it came to us -- and it came to me, and back then we</p> <p>21 had a field manager, Mike Petrovic.</p> <p>22 Q. How do you spell this last name?</p> <p>23 A. P-e-t-r-o-v-i-c.</p> <p>24 Q. And did you eventually speak to Scott</p> <p>25 Badger?</p>	<p style="text-align: right;">20</p> <p>1 A. Yes.</p> <p>2 Q. Did you go back to the site after</p> <p>3 that initial visit but before you generated your</p> <p>4 proposal or did you just make that initial visit and</p> <p>5 then generate the proposal?</p> <p>6 A. Initial visit, generated the</p> <p>7 proposal.</p> <p>8 Q. At some point in time did you speak</p> <p>9 to Scott Badger about what services were being</p> <p>10 requested of Slavco?</p> <p>11 A. Well, what happened, I think</p> <p>12 everything after that was forwarded -- I assume was</p> <p>13 forwarded to Barry Ages' office.</p> <p>14 Q. Did you speak to Mr. Ages?</p> <p>15 A. Yes.</p> <p>16 Q. Did he describe for you what services</p> <p>17 he was seeking to retain from --</p> <p>18 A. Yes.</p> <p>19 Q. And what was that description? What</p> <p>20 did he tell you?</p> <p>21 A. To remove approximately 7,000 -- I'm</p> <p>22 sorry. Scott Badger did state to remove 70 squares</p> <p>23 of asbestos roofing.</p> <p>24 Q. Did they describe for you, either</p> <p>25 Mr. Badger or Mr. Ages, what the status of the</p>
<p style="text-align: right;">19</p> <p>1 A. We first went and took a look at the</p> <p>2 job, we typed up a proposal and we forwarded it to</p> <p>3 Badger Roofing, that's what our proposal is made out</p> <p>4 to.</p> <p>5 Q. And you actually went out to the site</p> <p>6 at that time?</p> <p>7 A. Yes.</p> <p>8 Q. And who did you meet with?</p> <p>9 A. Nobody.</p> <p>10 Q. So you just went out and did a</p> <p>11 walk-through of the site --</p> <p>12 A. Yes.</p> <p>13 Q. -- to get an idea of what the job</p> <p>14 would involve?</p> <p>15 A. Yes.</p> <p>16 Q. You didn't meet with anybody from</p> <p>17 Badger or from the tenant, Bristol Meyer Squibb, or</p> <p>18 from the landlord, SKA, or Somerville Fidelco, at</p> <p>19 the time?</p> <p>20 A. No. We arrived at the site. There</p> <p>21 was no access, so we drove right across the street</p> <p>22 so we could try to get an elevated view of the roof,</p> <p>23 but we were never on the roof.</p> <p>24 Q. You said you generated a proposal at</p> <p>25 some point in time; is that correct?</p>	<p style="text-align: right;">21</p> <p>1 project was at that point?</p> <p>2 A. No.</p> <p>3 Q. Did either of them convey to you that</p> <p>4 Badger had started to do the roof removal and then</p> <p>5 had stopped the roof removal when it became apparent</p> <p>6 that asbestos was encountered at the site?</p> <p>7 A. When the proposal was generated, no.</p> <p>8 Immediately following the generation of the</p> <p>9 proposal.</p> <p>10 MR. VINICOMBE: I realize some of</p> <p>11 these documents may have been marked before, but I</p> <p>12 don't have the marked versions. I'll re-mark these</p> <p>13 as additional exhibits.</p> <p>14 (Exhibit BMS-33, fax from Heather at</p> <p>15 Slavco Construction, Inc., to Scott Badger, dated</p> <p>16 October 20, 2005, with attached Asbestos Abatement</p> <p>17 Proposal, is received and marked for</p> <p>18 Identification.)</p> <p>19 Q. I'll hand you what's been marked</p> <p>20 BMS-33.</p> <p>21 This is what appears to be a fax from</p> <p>22 Heather at your office to Scott Badger, dated</p> <p>23 October 20, 2005, with an Asbestos Abatement</p> <p>24 Proposal attached to it.</p> <p>25 Is that the proposal you were talking</p>

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<p style="text-align: right;">22</p> <p>1 about earlier?</p> <p>2 A. Yes.</p> <p>3 Q. And was this proposal accepted?</p> <p>4 A. This proposal was not accepted by</p> <p>5 Badger Roofing.</p> <p>6 Q. Was it accepted by somebody else?</p> <p>7 A. Yes. Let me just...</p> <p>8 It was accepted by Somerville Fidelco</p> <p>9 Associates.</p> <p>10 Q. Okay. Let me hand you what was</p> <p>11 previously marked as Exhibit BMS-9, which appears to</p> <p>12 be another copy of the proposal, signed by</p> <p>13 Somerville Fidelco Associates on the second page.</p> <p>14 A. Yes.</p> <p>15 Q. Okay. So it was accepted by</p> <p>16 Somerville Fidelco Associates, even though the</p> <p>17 proposal was addressed to Badger Roofing Company; is</p> <p>18 that correct?</p> <p>19 A. Yes.</p> <p>20 Q. Now, what was the scope of services</p> <p>21 that Slavco was proposing to perform on this</p> <p>22 project?</p> <p>23 A. Removal of approximately 7,000 square</p> <p>24 feet of asbestos-containing roofing material.</p> <p>25 Q. And at the time that you generated</p>	<p style="text-align: right;">24</p> <p>1 participate in some portion of the roof removal?</p> <p>2 A. To remove the asbestos-containing</p> <p>3 roofing material, the foam -- above the foam, the</p> <p>4 roofing layer, the roofing material.</p> <p>5 Q. Were you ever provided with lab</p> <p>6 results that indicated the presence of asbestos</p> <p>7 materials on the roof?</p> <p>8 A. No.</p> <p>9 Q. Were you informed that somebody had</p> <p>10 received lab results confirming the presence of</p> <p>11 asbestos in the roofing material?</p> <p>12 A. Yes.</p> <p>13 Q. Did you ever arrange for any testing,</p> <p>14 any testing for asbestos, to be done yourself?</p> <p>15 A. No.</p> <p>16 Q. So would it be fair to say you were</p> <p>17 relying upon the information they provided to you</p> <p>18 that asbestos was present; is that accurate?</p> <p>19 A. Yes.</p> <p>20 Q. And you treated the material as if it</p> <p>21 contained asbestos; is that accurate?</p> <p>22 A. Yes.</p> <p>23 Q. The pricing on this proposal was for</p> <p>24 \$32,000, correct?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">23</p> <p>1 this proposal, did you have an understanding that</p> <p>2 Badger had been originally retained by Somerville</p> <p>3 Fidelco Associates to do the roof removal?</p> <p>4 A. Yes.</p> <p>5 Q. So would it be fair to say it was</p> <p>6 your understanding at that time that Slavco was</p> <p>7 basically proposing to provide services to take over</p> <p>8 the roof removal from Badger?</p> <p>9 A. Yes.</p> <p>10 Q. Was Slavco proposing to have any</p> <p>11 involvement with the roof replacement on this</p> <p>12 project?</p> <p>13 A. No.</p> <p>14 Q. So your services were limited to</p> <p>15 completing the roof removal project that Badger had</p> <p>16 started, is that accurate?</p> <p>17 A. Just the asbestos portion of the roof</p> <p>18 removal.</p> <p>19 Q. Was there another aspect of the</p> <p>20 removal other than what you just said was asbestos</p> <p>21 removal?</p> <p>22 A. Just roofing material.</p> <p>23 Q. Just so I'm clear, was the scope of</p> <p>24 Slavco's services to do a complete roof removal or</p> <p>25 to at least complete the roof removal or just to</p>	<p style="text-align: right;">25</p> <p>1 Q. It was to include a deposit of \$6400,</p> <p>2 and then the balance to be paid later on, correct?</p> <p>3 A. Yes.</p> <p>4 Q. And was Slavco paid in full for the</p> <p>5 \$32,000?</p> <p>6 A. Yes.</p> <p>7 Q. Now, the proposal states, under</p> <p>8 "Scope of Work," that "Slavco will utilize NJ</p> <p>9 licensed asbestos handlers and supervisors on this</p> <p>10 project."</p> <p>11 Were licensed asbestos handlers and</p> <p>12 supervisors utilized on the project?</p> <p>13 A. Yes.</p> <p>14 Q. And I think I know the answer to this</p> <p>15 question, but I'll ask, who was the supervisor?</p> <p>16 A. Nikola Paunovski, N-i-k-o-l-a,</p> <p>17 P-a-u-n-o-v-s-k-i.</p> <p>18 Q. It's easier for me to say "Nikola,"</p> <p>19 so I'll refer to him that way.</p> <p>20 So you were not the supervisor on the</p> <p>21 project --</p> <p>22 A. No.</p> <p>23 Q. -- at any time?</p> <p>24 A. No.</p> <p>25 Q. If you know, who were the licensed</p>

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<p style="text-align: right;">26</p> <p>1 asbestos handlers that were used on the project?</p> <p>2 A. I don't have all their names.</p> <p>3 Q. But they were licensed, to your</p> <p>4 knowledge?</p> <p>5 A. Yeah, all of them.</p> <p>6 Q. And do you recall approximately how</p> <p>7 many employees were used on the job?</p> <p>8 A. Anywhere from eight to twelve.</p> <p>9 Q. Now, prior to this job, personally,</p> <p>10 how many asbestos abatement or removal projects had</p> <p>11 you personally been involved in?</p> <p>12 A. Prior to this?</p> <p>13 Q. Yes, if you can estimate. I realize</p> <p>14 you can't --</p> <p>15 A. At least over 50.</p> <p>16 Q. And if Nikola was serving as the</p> <p>17 supervisor on the project, how would you describe</p> <p>18 what your role or involvement was with the project?</p> <p>19 A. I was the field manager.</p> <p>20 Q. What tasks did you personally</p> <p>21 perform in that capacity?</p> <p>22 A. Direct communications with the owner.</p> <p>23 We also had to make sure the material was on the</p> <p>24 site, all disposal, everybody was licensed, their</p> <p>25 medical, their fit tests, all proper documents and</p>	<p style="text-align: right;">28</p> <p>1 A. In the State of New Jersey you do not</p> <p>2 need to have an asbestos license to remove a roof as</p> <p>3 long as you're replacing it and removing under, I</p> <p>4 think it was 5,200 square feet a day, something like</p> <p>5 that.</p> <p>6 Q. Do you also have to use certain</p> <p>7 methodologies or equipment for you not to be</p> <p>8 required to have an asbestos license in New Jersey</p> <p>9 to do an asbestos removal job on a roof?</p> <p>10 A. I'm not familiar with that because we</p> <p>11 are qualified.</p> <p>12 Q. And NESHAP is National Emission</p> <p>13 Standards For Hazard Air Pollutants, correct?</p> <p>14 A. Yes.</p> <p>15 Q. When you made the original proposal</p> <p>16 on this project, did you have any understanding at</p> <p>17 that time whether Badger was going to continue to</p> <p>18 play any role on the project if Slavco's services</p> <p>19 were retained?</p> <p>20 A. We had no clue.</p> <p>21 Q. At some point was it brought to your</p> <p>22 attention that Badger would continue to participate</p> <p>23 and that their role would be to do the roof</p> <p>24 replacement after you did the asbestos removal?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">27</p> <p>1 respirators and material needed to complete the job.</p> <p>2 Q. Do you recall how many times you were</p> <p>3 actually at the site?</p> <p>4 A. I was there a minimum of four to five</p> <p>5 times.</p> <p>6 Q. And were you at the site continuously</p> <p>7 during the time period that the Slavco employees</p> <p>8 were doing the roof removal?</p> <p>9 A. For a portion of the work, yes.</p> <p>10 Q. I'm going to hand you what was</p> <p>11 previously marked BMS-14.</p> <p>12 This appears to be a Slavco invoice</p> <p>13 dated December 27, 2005, for the job; is that</p> <p>14 correct?</p> <p>15 A. Yes.</p> <p>16 Q. And it makes reference to a \$6400</p> <p>17 deposit and a \$25,600 balance, correct?</p> <p>18 A. Yes.</p> <p>19 Q. And, to your knowledge, was this bill</p> <p>20 paid in its entirety?</p> <p>21 A. Yes.</p> <p>22 Q. Do you have any understanding whether</p> <p>23 an asbestos license issued by the State of New</p> <p>24 Jersey is required to remove asbestos materials from</p> <p>25 a roof?</p>	<p style="text-align: right;">29</p> <p>1 Q. And how was that brought to your</p> <p>2 attention?</p> <p>3 A. I spoke to Barry, and we had a</p> <p>4 meeting to go over the work procedures that we were</p> <p>5 going to implement and then to have -- after we were</p> <p>6 completed, to have Badger Roofing behind us, laying</p> <p>7 down the roof.</p> <p>8 Q. And on the job did the Badger</p> <p>9 employees work alongside the Slavco employees at the</p> <p>10 same time on the project?</p> <p>11 A. While we were working?</p> <p>12 Q. Yes.</p> <p>13 A. Yes.</p> <p>14 Q. And at any time, to your knowledge,</p> <p>15 was Slavco supervising or directing any of the work</p> <p>16 of the Badger employees --</p> <p>17 A. No.</p> <p>18 Q. -- on the job?</p> <p>19 A. No.</p> <p>20 Q. Now, the tenant at this facility is</p> <p>21 Bristol-Myers Squibb Company.</p> <p>22 At some point in time was it brought</p> <p>23 to your attention that Bristol-Myers was a tenant at</p> <p>24 the facility?</p> <p>25 A. Yes.</p>

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<p style="text-align: right;">30</p> <p>1 Q. Did Mr. Ages bring that to your 2 attention? Or, let me ask, how did you learn that? 3 A. I spoke to a field manager from 4 Squibb, I still have his card, when we were at the 5 job site. So from Barry we knew that there was a 6 tenant there. 7 Q. Who was that field manager? 8 A. I don't have his name. 9 Q. Let me give you a couple of names. I 10 don't want you to guess, but if any of these names 11 jog your recollection as the person you spoke to, 12 you can let me know. 13 John Deck? 14 A. I don't know. 15 Q. Bob Papa? 16 A. I don't know. 17 Q. Bob Post? 18 A. I don't have a recollection. 19 Q. You said you still have the business 20 card. Do you have the business card here? 21 A. No. It's probably in my computer 22 somewhere. 23 Q. When you met with that Bristol-Myers 24 representative, what did you discuss? 25 A. We walked through the building prior</p>	<p style="text-align: right;">32</p> <p>1 New Jersey, correct? 2 A. Yes. 3 Q. What aspect of that exceeded the 4 requirements of the regulations? 5 A. In the State of New Jersey you don't 6 have to -- we used a foam material, like a shave 7 cream foam, and you spray it, and we blanketed the 8 roofing material so that when you're scraping and 9 pulling it up, the dust doesn't go airborne. 10 Q. Have you used that method before on 11 other properties? 12 A. Yes. 13 Q. Is it common for you to use that 14 method on other projects? 15 A. For New York City. 16 Q. At any time were you asked to make 17 arrangements to have core samples taken of any of 18 the roof materials? 19 A. Can you repeat that? 20 Q. Yes. At any time after Slavco was 21 retained on this project, were you asked by anybody 22 to make arrangements for core samples to be taken of 23 the roof materials? 24 A. No. 25 Q. After Slavco was retained on this</p>
<p style="text-align: right;">31</p> <p>1 to starting, it could have been the end of November, 2 beginning of September, to see the TuffWrap was 3 installed, so he walked me through the building. 4 Q. What's TuffWrap? 5 A. TuffWrap is -- it's a plastic. It's 6 a company that puts up plastic, so if there's any 7 asbestos abatement or any kind of work above, that 8 that dust doesn't fall down, to keep the area 9 dust-free. 10 Q. Other than the TuffWrap that had been 11 installed, to your knowledge, were any measures 12 taken to limit or prevent dust or debris from the 13 completion of the roof removal project from entering 14 the building? 15 A. When we started? 16 Q. Yes. 17 A. Okay. When we started, we went 18 beyond the regulations of New Jersey, and we have a 19 work plan that I sent to them. And in the work plan 20 we stated that we were going to remove the roof 21 without crumbling, pulverizing or reducing to any 22 kind of powder, we're going to keep it wet, 23 adequately wet, and dispose of it properly. 24 Q. Now, you said that your plan went 25 above the regulatory requirements by the State of</p>	<p style="text-align: right;">33</p> <p>1 job, are you aware of anybody else having taken core 2 samples of the roofing materials? 3 A. There was a phone call made that 4 there was a sample taken, I think it was from EHI, 5 Environmental Health Investigations, that they took 6 a test and it came back positive, asbestos. 7 Q. Let me hand you what's been 8 previously marked as exhibits BMS-15 and BMS-16. 9 BMS-15 appears to be a draft of a 10 letter that Heather from Slavco forwarded to 11 Mr. Ages, and BMS-16 appears to be a signed copy of 12 that letter, dated October 26, 2005, sent to the New 13 Jersey Department of Labor. 14 With regard to BMS-15, the draft 15 letter that Heather forwarded, did you have any 16 involvement in the drafting of that letter? 17 A. Drafting the letter, no. 18 Q. Do you know who, if anybody, at 19 Slavco was involved in drafting that document? 20 A. It would be only Heather. 21 Q. What is Heather's position at Slavco? 22 A. She current -- she no longer works 23 with us. She was an administrative assistant. 24 Q. And do you have any understanding as 25 to why Heather forwarded a draft of a letter</p>

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<p style="text-align: right;">34</p> <p>1 addressed to the New Jersey Department of Labor to</p> <p>2 Barry Ages?</p> <p>3 A. Yes.</p> <p>4 Q. And what's that understanding?</p> <p>5 A. In the state of New Jersey, to apply</p> <p>6 for your -- to submit a notification -- you have ten</p> <p>7 days, ten calendar days to perform the work. To</p> <p>8 bypass that and to start to work immediately, you</p> <p>9 have to forward a reason why you want to start the</p> <p>10 work.</p> <p>11 Q. And in this letter it appears to be</p> <p>12 requesting a waiver of the ten-day notification</p> <p>13 period, correct?</p> <p>14 A. Yes.</p> <p>15 Q. Do you have an understanding why</p> <p>16 notice has to be given to the New Jersey Department</p> <p>17 of Labor before doing an asbestos removal job?</p> <p>18 A. So they have enough time to properly</p> <p>19 manage -- to oversee the job, because their</p> <p>20 inspectors do come out.</p> <p>21 Q. On this job do you recall any</p> <p>22 inspector from the New Jersey Department of Labor</p> <p>23 coming to the site?</p> <p>24 A. No.</p> <p>25 Q. Were you ever informed that a</p>	<p style="text-align: right;">36</p> <p>1 from Harry H. Leavy Associates suggesting that core</p> <p>2 samples be taken of the roof at the Somerville</p> <p>3 facility?</p> <p>4 A. I have to go back one question. Were</p> <p>5 you saying during the -- after our work was</p> <p>6 performed or prior?</p> <p>7 Q. At any time.</p> <p>8 A. At any time? There was a meeting</p> <p>9 where there was -- somebody did discuss samples,</p> <p>10 samples being taken, not core samples, roof samples</p> <p>11 Q. To your knowledge, were any core</p> <p>12 samples taken of the roofing materials before Badger</p> <p>13 performed its work on the site? Were you ever</p> <p>14 informed of that?</p> <p>15 A. I don't know, I don't know.</p> <p>16 Q. On other roofing jobs where Slavco is</p> <p>17 retained to do the roof removal -- and I recognize</p> <p>18 in this instance you were taking over a portion of a</p> <p>19 job that another contractor had started -- but on</p> <p>20 other roof removal jobs where you're the only</p> <p>21 contractor that's retained to do a roof removal,</p> <p>22 does Slavco have a practice of making inquiries as</p> <p>23 to whether core samples have already been taken of</p> <p>24 roofing materials before conducting its own removal</p> <p>25 activities?</p>
<p style="text-align: right;">35</p> <p>1 representative of the New Jersey Department of Labor</p> <p>2 had ever been to the site?</p> <p>3 A. No.</p> <p>4 Q. With regard to this letter which is</p> <p>5 requesting a waiver of the ten-day notification</p> <p>6 period, have you seen this type of letter used on</p> <p>7 other asbestos removal jobs that you've been</p> <p>8 involved in in New Jersey?</p> <p>9 A. Yes.</p> <p>10 Q. Are there any circumstances on an</p> <p>11 asbestos removal job in New Jersey where you don't</p> <p>12 either have to give a ten-day notification or</p> <p>13 request a waiver of the ten-day notification period?</p> <p>14 A. If the project is less than 1 linear</p> <p>15 foot of asbestos, you don't have to give a</p> <p>16 notification.</p> <p>17 Q. And other than that, you do have to</p> <p>18 give notification?</p> <p>19 A. Yes.</p> <p>20 Q. At any point did you, or, to your</p> <p>21 knowledge, anybody else at Slavco ever ask Barry</p> <p>22 Ages or Badger if core samples had ever been taken</p> <p>23 of the roof at the Somerville facility?</p> <p>24 A. No.</p> <p>25 Q. Were you ever provided with a report</p>	<p style="text-align: right;">37</p> <p>1 A. Since -- we do not ask that. If the</p> <p>2 term -- if the word comes up, "asbestos," and</p> <p>3 somebody states to us there's asbestos on the roof,</p> <p>4 we assume and we just proceed with asbestos removal.</p> <p>5 Q. But if you're making a proposal on a</p> <p>6 roofing job where somebody doesn't mention the</p> <p>7 presence of asbestos, do you typically make</p> <p>8 inquiries of the owner as to whether the roof has</p> <p>9 been tested for asbestos or whether core samples</p> <p>10 have been taken of any roofing materials?</p> <p>11 A. Yes, we do.</p> <p>12 Q. Do you do that on every job where</p> <p>13 you're proposing to provide services for a roof</p> <p>14 removal?</p> <p>15 A. Yes.</p> <p>16 Q. And why is that?</p> <p>17 A. There's different procedures if</p> <p>18 you're removing construction debris compared to</p> <p>19 asbestos. There's different disposal sites, higher</p> <p>20 costs, so we have to make sure -- plus there's laws</p> <p>21 that we have to remove the roof the proper way.</p> <p>22 Q. And what is the difference in those</p> <p>23 procedures between an ordinary roofing job and a</p> <p>24 roofing job where you encounter asbestos?</p> <p>25 A. Lots of differences. First, the</p>

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<p style="text-align: right;">38</p> <p>1 people you can use, they do not have to be asbestos 2 certified if the roof is non-asbestos. The disposal 3 site, construction debris you can dispose of at any 4 local site in New Jersey that accepts roofing 5 material. The price is completely different. 6 There's, you know, numerous aspects. 7 Q. What about in terms of the equipment 8 that's used or the methods of removal that are used, 9 are there any differences in that? 10 A. Yes, in removing a non-asbestos roof, 11 you're allowed to cut it. You can do anything to 12 it, cut it, rip it, you know, the easiest way to 13 remove it. 14 When it is an asbestos roof, you 15 cannot pulverize it; you have to limit the dust. 16 Q. And is that to prevent non-friable 17 asbestos from becoming friable? 18 A. Yes. 19 Q. And if there is dust, does that 20 indicate to you that it's friable asbestos? 21 A. No. 22 Q. What would be an indication that 23 non-friable asbestos has become friable? 24 A. An air sample. 25 Q. Is my understanding correct that a</p>	<p style="text-align: right;">40</p> <p>1 New Jersey," Bates Stamped SF00258, is received and 2 marked for Identification.) 3 Q. I'm handing you what's been marked 4 BMS-34. 5 Can you identify what this document 6 is? 7 A. Yes. 8 Q. What is it? 9 A. It's the work plan that we used to 10 remove the roof at the Somerville project. 11 Q. And was this work plan followed at 12 the site? 13 A. Yes. 14 (Exhibit BMS-35, document entitled 15 "Procedures For The Removal Of Roofing, 76 Fourth 16 Street," Bates stamped SF00641 through 643, is 17 received and marked for Identification.) 18 Q. I've handed you what's been marked 19 BMS-35. 20 Can you identify what that document 21 is? 22 A. Procedures for removal of roofing at 23 76 Fourth Street. 24 Q. These are Slavco's procedures? 25 A. These are our procedures, yes.</p>
<p style="text-align: right;">39</p> <p>1 service was retained to do air sampling during 2 Slavco's roof removal in this project? 3 A. Yes. 4 Q. And do you know what the results of 5 any of that testing were? 6 A. No. 7 Q. So you don't know whether or not that 8 testing indicated the presence of asbestos or not? 9 A. During the -- there was Environmental 10 Health Investigations. After the completion of the 11 project, we did speak to them and they said 12 everything looked good, but I don't recall physical 13 records. 14 Q. Did Slavco retain EHI's services or 15 was it SK Associates that did that? 16 A. It was not Slavco. 17 Q. On other jobs where Slavco is 18 proposing to do a roof removal, if the building is 19 older than 25 years, is it Slavco's practice to 20 inquire whether asbestos is present of the owner? 21 A. We inquire -- well, I wouldn't even 22 say 25 years, say, you know, 15 years, going back, 23 we always inquire if there's asbestos present. 24 (Exhibit BMS-34, document entitled 25 "Work Plan & Schedule, 76 Fourth Street, Somerville,</p>	<p style="text-align: right;">41</p> <p>1 Q. Again, were these followed at the 2 site? 3 A. Yes. 4 Q. Comparing BMS-34 to BMS-35, is BMS-35 5 just a more detailed description of the procedures 6 and work plan that Slavco was following at the site? 7 A. Yes. 8 (Exhibit BMS-36, document entitled 9 "Slavco Construction, Inc., Standard Operating 10 Procedures," Bates stamped SF00001 through 192, is 11 received and marked for Identification.) 12 Q. I've handed you what's been marked 13 BMS-36. 14 Can you identify what this document 15 is? 16 A. This is our standard operating 17 procedures, Slavco Construction standard operating 18 procedures. 19 Q. Now, BMS-34 and 35, the work plan and 20 schedule and the procedures for the removal of the 21 roof, these documents were generated specifically 22 for the Somerville project, correct? 23 A. Yes. 24 Q. BMS-36, was this generated 25 specifically for the Somerville project or is this</p>

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<p style="text-align: right;">42</p> <p>1 just a general set of standard operating procedures</p> <p>2 that Slavco references on all projects?</p> <p>3 A. Just a general.</p> <p>4 Q. So this document was not generated</p> <p>5 just for the Somerville job, correct?</p> <p>6 A. Correct.</p> <p>7 Q. Now, with regard to the Somerville</p> <p>8 job, are there certain portions of the standard</p> <p>9 operating procedures that applied to that job, or</p> <p>10 was it the entire set of standard operating</p> <p>11 procedures?</p> <p>12 A. It was not the entire set. The</p> <p>13 portions that would be would be the respirator</p> <p>14 protection program.</p> <p>15 Q. That's number 3.</p> <p>16 A. Medical examinations.</p> <p>17 Q. Okay. Let me just back up. This is</p> <p>18 a very long document, so I want to make sure we're</p> <p>19 all referencing the same page.</p> <p>20 Are you looking at SF00002?</p> <p>21 A. Yes.</p> <p>22 Q. Then there's what appears to be an</p> <p>23 index, correct?</p> <p>24 A. Correct.</p> <p>25 Q. The first one you mentioned is item</p>	<p style="text-align: right;">44</p> <p>1 A. All our workers have a fit test.</p> <p>2 Q. A what?</p> <p>3 A. A fit test.</p> <p>4 Q. What's that?</p> <p>5 A. It's a test to make sure the mask</p> <p>6 properly adheres to the face.</p> <p>7 Q. To your knowledge, the Slavco</p> <p>8 employees who were involved in this asbestos removal</p> <p>9 project, did they wear masks when they were on the</p> <p>10 job?</p> <p>11 A. Yes.</p> <p>12 Q. Other than the mask, is there any</p> <p>13 other respiratory protection measures that are</p> <p>14 taken?</p> <p>15 A. No.</p> <p>16 Q. Abatement procedures, what abatement</p> <p>17 procedures were used on this project?</p> <p>18 A. The ones outlined in BMS-35.</p> <p>19 Q. To your knowledge, were all those</p> <p>20 measures taken on this job?</p> <p>21 A. Yes.</p> <p>22 Q. Is there another section of the</p> <p>23 manual that you said was legally required for</p> <p>24 asbestos abatement?</p> <p>25 A. Number 2, Medical Examinations.</p>
<p style="text-align: right;">43</p> <p>1 3, Respiratory Protection Program, correct?</p> <p>2 A. Correct.</p> <p>3 Q. What's the next section that applied</p> <p>4 to this project?</p> <p>5 A. Medical Examinations, number 2.</p> <p>6 Q. Okay. Any other sections?</p> <p>7 A. Number 4, number 5 -- number 4 being</p> <p>8 Energy Preparedness Procedures -- Emergency -- I'm</p> <p>9 sorry; number 5, Engineering Controls and Work</p> <p>10 Practices; number 6, Abatement Procedures; number 7</p> <p>11 Contamination Procedures, and then number 10,</p> <p>12 Construction Safety Employee Handbook.</p> <p>13 Q. Now, are any of these standard</p> <p>14 operating procedures that you just went through, are</p> <p>15 any of these required by law if you're doing an</p> <p>16 asbestos removal project?</p> <p>17 A. Yes.</p> <p>18 Q. Which of those, all of them or just</p> <p>19 some portion of those, to your knowledge?</p> <p>20 A. To my knowledge, it would be the</p> <p>21 Medical Examinations, number 2, the Respiratory</p> <p>22 Protection Program, number 3, number 6, Abatement</p> <p>23 Procedures. That's it.</p> <p>24 Q. Okay. Now, on this job what measures</p> <p>25 were taken with regard to respiratory protection?</p>	<p style="text-align: right;">45</p> <p>1 Q. What was done with regard to Medical</p> <p>2 Examinations on this project?</p> <p>3 A. All our employees, prior to hiring,</p> <p>4 they have a medical, full medical exam, X-ray, to</p> <p>5 make sure, you know, they're fit to perform the</p> <p>6 duties.</p> <p>7 Q. Is there any other section or did we</p> <p>8 go through all the ones that you believe are legally</p> <p>9 required?</p> <p>10 A. I think we went through all of them.</p> <p>11 Q. Okay. Can you describe for me in as</p> <p>12 much detail as you can recall what methods were used</p> <p>13 by Slavco to remove and dispose of the asbestos</p> <p>14 materials on the roof?</p> <p>15 A. The methods that we used?</p> <p>16 Q. Yes.</p> <p>17 A. They would -- Friday night, when we</p> <p>18 started the job, we mobilized our trailer, our</p> <p>19 container. We set up our ladder. The workers went</p> <p>20 on the roof, started prepping the roof, wetting it</p> <p>21 down adequately, cutting the roof in sections so</p> <p>22 they can be put through the chute, straight into our</p> <p>23 container.</p> <p>24 Q. What type of equipment or tools were</p> <p>25 used to cut the material?</p>

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<p style="text-align: right;">46</p> <p>1 A. There was a roof warrior.</p> <p>2 Q. Roof warrior?</p> <p>3 A. Yes. It's a machine that has a blade</p> <p>4 so it can slice through the roof.</p> <p>5 Q. Do you know what type of blade it</p> <p>6 has?</p> <p>7 A. Exactly... it's a ripper blade.</p> <p>8 Q. Other than the roof warrior, was any</p> <p>9 other equipment or tools used to slice the asbestos</p> <p>10 material?</p> <p>11 A. Yes, a roofing slicing machine,</p> <p>12 cutting machine.</p> <p>13 Q. Any other tools that were used?</p> <p>14 A. Axes, shovels, crowbars. That's it.</p> <p>15 Q. I believe you said earlier the</p> <p>16 materials, once it was sliced and cut up, were</p> <p>17 placed in chutes?</p> <p>18 A. Yes.</p> <p>19 Q. What's a chute?</p> <p>20 A. Here's a chute (indicating). It's a</p> <p>21 plastic piece from the roof that extends down, an</p> <p>22 enclosed piece that extends down maybe 15 feet.</p> <p>23 Q. Okay. You've made reference to a</p> <p>24 photograph contained in the materials marked BMS-32.</p> <p>25 correct?</p>	<p style="text-align: right;">48</p> <p>1 A. As the roof is being cut, to suck up</p> <p>2 the dust, to vacuum the dust.</p> <p>3 The roof warrior is letter C. That</p> <p>4 was to bring the roof up, to bring the roof up after</p> <p>5 being sliced.</p> <p>6 D, that's our roof warrior being</p> <p>7 brought onto the roof.</p> <p>8 E, same thing, Badger Roofing, our</p> <p>9 chute, the project at Somerville and our container.</p> <p>10 F, just continuous, the Badger</p> <p>11 Roofing truck hoisting our equipment up to the roof</p> <p>12 G, a picture of the chute with</p> <p>13 plastic behind the wall and the workers on the roof.</p> <p>14 H, our container with our New Jersey</p> <p>15 sign, license.</p> <p>16 I, Badger Roofing truck, our</p> <p>17 container, the chute.</p> <p>18 Q. And the materials, I take it from</p> <p>19 those photos, the materials were transferred from</p> <p>20 the roof to the dumpster through the use of the</p> <p>21 chute; is that correct?</p> <p>22 A. Yes.</p> <p>23 Q. And the dumpster that contained the</p> <p>24 materials, how was that disposed of?</p> <p>25 A. How was it disposed?</p>
<p style="text-align: right;">47</p> <p>1 A. Yes.</p> <p>2 Q. Let me do this, since each page,</p> <p>3 there's no markings, I'm just going to put a letter</p> <p>4 next to each photo so we all know what we're talking</p> <p>5 about, and then I'll ask you some questions about</p> <p>6 that, if that's okay with you.</p> <p>7 I've put letters next to these</p> <p>8 photos.</p> <p>9 The photos that are in this package</p> <p>10 of materials, are these photographs that you took at</p> <p>11 the Somerville site during the job?</p> <p>12 A. Yes.</p> <p>13 Q. And could you just go through each</p> <p>14 photo and tell us what the letter is and describe</p> <p>15 for us what's been shown in each of those pictures?</p> <p>16 A. Letter A, there's a picture of a</p> <p>17 building with a chute, ladder and Badger Roofing</p> <p>18 bringing our equipment on the roof.</p> <p>19 B, the roof cutter with the HEPA</p> <p>20 filtration unit.</p> <p>21 Q. The roof cutter with the HEPA</p> <p>22 filtration, is there a reason why there's HEPA</p> <p>23 filtration?</p> <p>24 A. Yes.</p> <p>25 Q. Why is that?</p>	<p style="text-align: right;">49</p> <p>1 Q. Correct.</p> <p>2 A. It was taken to Grows Landfill.</p> <p>3 Q. Is that a special site designated for</p> <p>4 asbestos materials or is that just a general</p> <p>5 landfill?</p> <p>6 A. For asbestos. It could be a general</p> <p>7 landfill, but we utilize that for asbestos.</p> <p>8 Q. Now, the chute that you used, is that</p> <p>9 required by regulations, to use a chute if you're</p> <p>10 transferring asbestos materials from a roof to the</p> <p>11 ground?</p> <p>12 A. Yes.</p> <p>13 Q. Is it appropriate to take roofing</p> <p>14 materials that contain asbestos and throw it off the</p> <p>15 side of the building into a dumpster?</p> <p>16 A. You can do that.</p> <p>17 (Exhibit BMS-37, Slavco Construction,</p> <p>18 Inc., Closeout Package, Bates stamped SF00413</p> <p>19 through 507, is received and marked for</p> <p>20 Identification.)</p> <p>21 Q. I hand you what's been marked BMS-37</p> <p>22 Can you identify what this document</p> <p>23 is?</p> <p>24 A. This is our closeout package.</p> <p>25 Q. And what is a closeout submittal?</p>

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<p style="text-align: right;">50</p> <p>1 A. After the completion of the project, 2 we supply the customer with the documentation: our 3 asbestos license, our insurance certificate, our 4 waste hauler license and notification, logbooks, 5 sign-off sheets, OSHA samples, waste manifests and 6 employee information. 7 Q. Before working on this project, were 8 you familiar with Badger Roofing Company? 9 A. No. 10 Q. I take it you had never worked with 11 them before on other projects; is that accurate? 12 A. Correct. 13 Q. Do you know if Badger had recommended 14 Slavco's services to the owner? 15 A. Don't know. 16 Q. Do you know how it came to be that 17 Slavco was contacted for this job? Did anybody ever 18 explain that to you? 19 A. In detail, no, but my understanding 20 is that through Environmental Health Investigations 21 they wanted -- the air monitor that was on-site. 22 Q. So it was EHI or somebody from EHI 23 that -- 24 A. Yes. 25 Q. At any time, either during this</p>	<p style="text-align: right;">52</p> <p>1 Q. No. My question was, at any point 2 did anybody ask you if Badger had used proper 3 methods or equipment for the removal of asbestos, 4 and I understood your answer to be that issue did 5 come up at a meeting that you attended. Did you 6 respond to that question in any way? 7 A. Well, their methodology was -- the 8 way they used it, the roof warrior and everything, 9 was proper, it's just that the -- how can I explain 10 it? It's just suppressing the dust was not right, 11 that's all I'm saying. 12 Q. What do you mean by that? 13 A. They didn't wet down the material 14 because there was a lot of dust -- they said there 15 was a lot of dust going inside the building. 16 Q. Who told you that? 17 A. Somebody at the table. I don't 18 recall their names. 19 Q. Other than the suppressing of the 20 dust, was there anything else you said in terms of 21 Badger not using the right methods or equipment? 22 A. No. 23 Q. From your earlier answer, I 24 understand that you're not familiar with the details 25 in terms of the equipment and method that Badger had</p>
<p style="text-align: right;">51</p> <p>1 project or afterwards, were you ever informed about 2 the methods or equipment Badger had used to do the 3 partial roof removal at the site? 4 A. Not in detail. 5 Q. What was your understanding, if any, 6 as to what methods and equipment they had used? 7 A. Just -- no methods, no equipment, 8 just the project went wrong. 9 Q. The project went wrong? 10 A. Yeah, something went wrong. They 11 found asbestos and they removed a portion of the 12 roof that contained asbestos. 13 Q. At any point did Barry Ages or 14 anybody else associated with SK, or Somerville 15 Fidelco, did anybody ever ask you whether Badger had 16 been using proper methods or equipment for the 17 removal of asbestos? 18 A. Yes. 19 Q. Who asked you that? 20 A. I don't recall the person's name. It 21 was a meeting that -- at SK with EHI, with Badger 22 Roofing and myself and I guess a couple of partners. 23 Q. What did you tell them when that 24 question was asked of you? 25 A. How it was removed properly or --</p>	<p style="text-align: right;">53</p> <p>1 used, correct? 2 A. Correct. 3 Q. Let me hand you what was previously 4 marked as BMS-27. These are copies of photos that 5 were produced to us by Somerville Fidelco. 6 My question for you is whether any of 7 the equipment that Slavco used at the site, is that 8 depicted in any of these photographs. 9 A. Yes. 10 Q. Let's start with the first page, 11 which is 300. 12 Is that a piece of Slavco equipment? 13 A. Yes. 14 Q. And what is that piece of equipment? 15 A. Roof warrior. 16 Q. How about 301? 17 A. The ripper blade attached to the roof 18 warrior. 19 Q. 302? 20 A. Ripper blade attached to the roof 21 warrior. 22 Q. So this is all Slavco equipment shown 23 there? 24 A. Looks like it. The picture's not... 25 Q. Okay. Let me hand you what's been</p>

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<p style="text-align: right;">54</p> <p>1 previously marked BMS-28. 2 These are what have been previously 3 identified as photographs of the roof reflecting the 4 time period when Badger was doing the roof removal 5 and replacement, so I understand that this does not 6 depict Slavco's equipment, but I have a few 7 questions for you. 8 The piece of equipment that's shown 9 in BMS 1212, do you recognize what that piece of 10 equipment is? 11 I don't want you to guess, but if you 12 have any understanding based upon looking at the 13 photo, if you could answer that. 14 A. I'm not sure. I can assume. It 15 looks like a roof cutter and a roof warrior, but 16 this picture's not... 17 Q. Can you tell what type of roof cutter 18 that is? 19 A. I don't know. 20 Q. How about BMS 1214? 21 A. Looks like a roof cutter. 22 Q. From the photo can you tell what type 23 of roof cutter that is? 24 A. No. 25 Q. How about 1215?</p>	<p style="text-align: right;">56</p> <p>1 using any respiratory -- I don't recall. 2 Q. And what was the reason for that, 3 keeping them 25 feet away? 4 A. Usually, in our standard operations, 5 we like keeping the work area 25 feet away when 6 we're working with asbestos. 7 Q. And why is that? 8 A. It's just our procedure. 9 Q. And is that to prevent other people 10 from being exposed to asbestos? 11 A. Yes, if an accident does occur. 12 Q. You had mentioned earlier, you had 13 used the term NESHAP, which is the National Emission 14 Standards for Hazardous Air Pollutants, correct? 15 A. Yes. 16 Q. Are you familiar with the 17 requirements under NESHAP for asbestos removal? 18 A. Generally familiar with them. 19 Q. Is there somebody else at Slavco that 20 you rely upon as having greater knowledge or 21 expertise with the requirements of NESHAP? 22 A. If we need to know in detail, we will 23 call an environmental company, an air-monitoring 24 company or the Department of Labor, because, you 25 know, it depends how you read it.</p>
<p style="text-align: right;">55</p> <p>1 A. It looks like the back of a roof 2 warrior. 3 Q. In terms of the roof cutter that you 4 used, is there a certain type of roof cutter you're 5 supposed to use if you're removing 6 asbestos-containing roofing material? 7 A. Our procedures are, you know, when 8 we're cutting the roof, we always use -- our 9 company, we use Garlock, and we always have a HEPA 10 vacuum attached to it. 11 Q. Are you familiar with a piece of 12 equipment called a Panther saw? 13 A. No. 14 Q. Do you know what an RB roof cutter 15 is? 16 A. I don't know what RB is. I know what 17 a roof cutter is. 18 Q. When Slavco was providing its roof 19 removal services and doing the work on the roof, did 20 you notice if any of the Badger employees were using 21 respiratory protective gear of any type? 22 A. When we were working on the roof? 23 Q. Yes. 24 A. We kept Badger Roofing employees 25 25 feet away from us, but I don't recall any of them</p>	<p style="text-align: right;">57</p> <p>1 Q. Do you know if this roofing job 2 qualified for an exemption from NESHAP's asbestos 3 removal notification requirement? 4 A. No, I can't answer that. 5 Q. Were you ever informed whether, 6 before Badger began its work on the project, whether 7 any notifications were provided to any governmental 8 agency for the roof job? 9 A. No. I don't know. It wasn't 10 mentioned to us. 11 Q. Do you know what an asbestos survey 12 is? 13 A. Yes. 14 Q. Were you ever informed whether an 15 asbestos survey had ever been performed at the 16 Somerville facility before Badger started its 17 roofing job? 18 A. No. 19 Q. Were you ever provided a copy of an 20 asbestos survey for the Somerville facility? 21 A. No. 22 Q. What is an asbestos survey? 23 A. It's a survey stating the samples 24 that were taken at a project. And a positive 25 sample's greater than 1 percent -- greater than 1</p>

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<p>58</p> <p>1 percent of the material contains asbestos.</p> <p>2 Q. Do you know if the work that Slavco</p> <p>3 did at the site qualifies as renovations under the</p> <p>4 NESHAP regulations?</p> <p>5 A. Yes.</p> <p>6 Q. It did qualify?</p> <p>7 A. It's a renovation.</p> <p>8 Q. Do you know what the regulatory</p> <p>9 definition is of asbestos-containing material?</p> <p>10 A. No.</p> <p>11 Q. Do you know the difference between</p> <p>12 friable and non-friable asbestos-containing</p> <p>13 material?</p> <p>14 A. Yes.</p> <p>15 Q. And what is that difference?</p> <p>16 A. Non-friable is basically floor</p> <p>17 tile -- material that cannot become airborne: floor</p> <p>18 tile, Transite panels, roofing material. Friable</p> <p>19 materials is material that can easily, easily become</p> <p>20 airborne: pipe, piping insulation, boiler, boiler</p> <p>21 breach, stuff like that.</p> <p>22 Q. In your experience, can non-friable</p> <p>23 asbestos material become friable?</p> <p>24 A. Can it? Yes.</p> <p>25 Q. How?</p>	<p>60</p> <p>1 Q. Was any of the material that Slavco</p> <p>2 removed during the project sanded, ground, cut or</p> <p>3 abraded?</p> <p>4 A. No.</p> <p>5 Q. Was any of the material that Slavco</p> <p>6 encountered during the job crumbled, pulverized or</p> <p>7 reduced to powder, to your knowledge?</p> <p>8 A. No.</p> <p>9 Q. Do you know what the OSHA regulatory</p> <p>10 classification was for the Slavco roofing job?</p> <p>11 A. No.</p> <p>12 Q. Were you familiar with the different</p> <p>13 classes under OSHA for asbestos, class 1, class 2?</p> <p>14 A. Yes, friable, non-friable.</p> <p>15 Q. And do you know what regulatory</p> <p>16 classification this Slavco roofing job fell into</p> <p>17 under those classes?</p> <p>18 A. No.</p> <p>19 Q. The standard operating procedures</p> <p>20 that were referred to earlier, are they periodically</p> <p>21 reviewed and updated by Slavco?</p> <p>22 A. I can't answer that. I don't know</p> <p>23 when the last time is they were updated.</p> <p>24 Q. Do you believe that they're current</p> <p>25 in terms of complying with governmental regulations</p>
<p>59</p> <p>1 A. If you're grinding non-friable</p> <p>2 without having -- well, that's it.</p> <p>3 Q. If clouds of roofing material dust or</p> <p>4 powder are created when a contractor performs the</p> <p>5 removal of asbestos-containing material, is that an</p> <p>6 indication that non-friable removal methods are not</p> <p>7 being used by the contractor?</p> <p>8 A. It could be, because under the</p> <p>9 roofing material you also have insulation which can</p> <p>10 become very airborne that's non-asbestos, so it's --</p> <p>11 without a sample you cannot, you cannot state.</p> <p>12 Q. Do you know if any</p> <p>13 asbestos-containing materials at the Somerville</p> <p>14 facility would be classified as regulated</p> <p>15 asbestos-containing material?</p> <p>16 A. Regulated?</p> <p>17 Q. Yes.</p> <p>18 A. Well, the roofing material?</p> <p>19 Q. Correct.</p> <p>20 A. If it's asbestos, but under NESHAP,</p> <p>21 if they're going to state regulate it, I'm not sure.</p> <p>22 Q. Did you ever encounter on this job</p> <p>23 any non-friable asbestos-containing material that</p> <p>24 became friable?</p> <p>25 A. No.</p>	<p>61</p> <p>1 for asbestos removal?</p> <p>2 A. Yes.</p> <p>3 MR. VINICOMBE: I think I'm done. I</p> <p>4 just want to look through the documents while</p> <p>5 Mr. Maher has any questions for you.</p> <p>6 MR. MAHER: If possible, let's take a</p> <p>7 quick break.</p> <p>8 MR. VINICOMBE: Sure. Why don't we</p> <p>9 do that?</p> <p>10 (There is a brief recess.)</p> <p>11 MR. VINICOMBE: I just have a couple</p> <p>12 of questions about the documents that you produced</p> <p>13 to us today.</p> <p>14 BY MR. VINICOMBE:</p> <p>15 Q. There is one document that has</p> <p>16 "Friday, 12/16/05" at the top, and it's in</p> <p>17 handwriting and it's a total of five pages.</p> <p>18 Is this a log of some sort?</p> <p>19 A. That's what the supervisor on-site</p> <p>20 would do, just general log entries.</p> <p>21 Q. Does this appear to be Nikola's</p> <p>22 handwriting?</p> <p>23 Do you recognize his handwriting?</p> <p>24 A. I do not recognize his handwriting.</p> <p>25 His signature should be...</p>

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<p style="text-align: right;">62</p> <p>1 Q. On the last page?</p> <p>2 A. Yes.</p> <p>3 Q. So this is the supervisor from the</p> <p>4 job?</p> <p>5 A. Yes.</p> <p>6 Q. The only other question I had is</p> <p>7 there appears to be a fax cover sheet, it says "From</p> <p>8 Phyllis Jones for Mike Solakov to Scott Badger,"</p> <p>9 dated March 8, 2006. And it starts with "Dear</p> <p>10 Scott, Our position remains that this bill is</p> <p>11 grossly overstated from the agreement that was made</p> <p>12 on-site between Alan and Mike." And then later on</p> <p>13 in the fax it talks about "If we agree to \$2,880..."</p> <p>14 Was this some sort of dispute? Was</p> <p>15 Badger billing fees to Slavco?</p> <p>16 A. Yes.</p> <p>17 Q. Can you explain to me what that is</p> <p>18 referring to?</p> <p>19 A. The billing was -- when we originally</p> <p>20 got to the site, he had a crane there, so he</p> <p>21 assisted us to bring our pieces of equipment to the</p> <p>22 roof. Then after the first night of work, we had to</p> <p>23 slow down a little bit because of the temperature,</p> <p>24 so we did not have a complete night shift. We</p> <p>25 waited till the morning and we started again. And</p>	<p style="text-align: right;">64</p> <p>1 roof removal; is that accurate?</p> <p>2 Do you want to see your index?</p> <p>3 A. October -- October 12th.</p> <p>4 Q. October 12th?</p> <p>5 A. Yes.</p> <p>6 Q. I think your proposal -- do you have</p> <p>7 BMS-33 there, Mr. Solakov? It's your original</p> <p>8 proposal.</p> <p>9 A. Yes.</p> <p>10 Q. Isn't that dated October 20th?</p> <p>11 A. Let me see. BMS --</p> <p>12 Q. BMS-33 --</p> <p>13 A. There were two proposals.</p> <p>14 Q. -- it was a fax cover sheet with your</p> <p>15 proposal.</p> <p>16 A. Here we are.</p> <p>17 Yes. I'm sorry.</p> <p>18 Q. So your original proposal was October</p> <p>19 20th?</p> <p>20 A. Yes.</p> <p>21 Q. And I heard you testify that that was</p> <p>22 addressed to Badger Roofing, but actually accepted</p> <p>23 by Somerville Fidelco as the owner of the facility;</p> <p>24 is that right?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">63</p> <p>1 for Badger Roofing, they thought we were behind</p> <p>2 schedule. So they had some of their guys lift up</p> <p>3 the bulkheads for us so we can proceed a little</p> <p>4 quicker, so that's the bill.</p> <p>5 Q. And they were billing you for the use</p> <p>6 of that equipment?</p> <p>7 A. No, to lift up the bulkheads.</p> <p>8 Q. And in terms of what Badger billed to</p> <p>9 you, did you pass that cost on to the owner or did</p> <p>10 you increase your bill in any way to reflect those</p> <p>11 expenses?</p> <p>12 A. No.</p> <p>13 MR. VINICOMBE: Thank you.</p> <p>14 CROSS-EXAMINATION BY MR. MAHER:</p> <p>15 Q. Good morning, Mr. Solakov. My name</p> <p>16 is Lawrence Maher. I'm with the firm of Greenbaum</p> <p>17 Rowe, Smith & Davis. We represent Somerville</p> <p>18 Fidelco, which is the landlord at the Somerville</p> <p>19 facility that is the subject of this arbitration.</p> <p>20 The instructions that Mr. Vinicombe</p> <p>21 gave you regarding the procedure of the deposition</p> <p>22 still apply, and I'll just ask you a few questions.</p> <p>23 I think you testified that</p> <p>24 approximately October 26 the proposal was accepted</p> <p>25 by Somerville Fidelco and you were hired to do this</p>	<p style="text-align: right;">65</p> <p>1 Q. So it would probably be at some time</p> <p>2 after October 20th that that proposal was accepted?</p> <p>3 MR. VINICOMBE: Off the record.</p> <p>4 (Discussion off the record.)</p> <p>5 Q. In the file you presented today, do</p> <p>6 you have a copy of that proposal?</p> <p>7 A. Yes. Because the actual -- the</p> <p>8 proposal is dated -- the date is October 12th.</p> <p>9 Q. You know what? Mr. Vinicombe advised</p> <p>10 me off the record, and I think that there might have</p> <p>11 been some confusion about the dates in the document</p> <p>12 that was produced.</p> <p>13 So it's your testimony that October</p> <p>14 12th the proposal was accepted by the owner?</p> <p>15 A. Yes.</p> <p>16 Q. And once the proposal was accepted,</p> <p>17 were you ready to start work?</p> <p>18 A. Yes.</p> <p>19 Q. Can you tell me what Slavco</p> <p>20 Construction did once the proposal was accepted on</p> <p>21 October 12th?</p> <p>22 A. Barry wanted us to start immediately,</p> <p>23 so we had to file the ten-day emergency waiver to</p> <p>24 waive the ten-day notification, and we filed that.</p> <p>25 We were approved.</p>

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<p style="text-align: right;">66</p> <p>1 Q. Was that the waiver that was drafted 2 by Heather and signed by Barry on October 26th? 3 A. Yes. 4 Q. So that was submitted to the 5 Department of Labor? 6 A. And I think it was the Department of 7 Health and Human Services. 8 Q. And did you start right away? 9 A. No. 10 Q. Why not? 11 A. Barry called us, put the job on hold 12 because the tenants were not ready for us to come to 13 the site. 14 Q. Now, prior to that, had you or anyone 15 else at Slavco Construction met with the tenants at 16 the site? 17 A. No. 18 Q. And when Barry Ages told you to put 19 the job on hold, did he tell you what was the 20 holdup? 21 A. In detail, no, just there was some 22 issues that had to be resolved with the tenants. 23 Q. And what was the next thing that you 24 recall that occurred with the job and the tenant? 25 A. Within a couple week period there was</p>	<p style="text-align: right;">68</p> <p>1 would be questioned as to what your procedures and 2 plans are? 3 A. No, it's not typical. 4 Q. Were you asked to provide the copy of 5 this thick document that is your standard operating 6 procedures that has been marked BMS-36 -- 7 A. Yes. 8 Q. And who did you provide that to? 9 A. Handed it in to Barry Ages. 10 Q. And was it your understanding this 11 was requested by the tenant as well? 12 A. I don't recall that. 13 Q. Would you typically present this 14 standard operating procedures manual to someone when 15 you were going to do a roof removal job? 16 A. No. 17 Q. Now, did there come a point in time 18 when you actually met with representatives of the 19 tenant at the site? 20 A. Yes. 21 Q. And I think you testified that you 22 walked through the facility; is that correct? 23 A. Through a portion of it, yes. 24 Q. And when you walked through, why did 25 you do that?</p>
<p style="text-align: right;">67</p> <p>1 no communication, and then, again, we tried to start 2 to do the roof. And Barry put the job on hold 3 again. He said, wait, the tenant's still not ready. 4 So that might have happened two or three times, and 5 then one time for weather. 6 Q. Now, during this period of time that 7 you were told the tenant wasn't ready, do you recall 8 being asked to provide information that the tenant 9 was requesting about the procedures you were going 10 to use? 11 A. Yes. 12 Q. And is that information something 13 that you worked on? 14 A. For a work plan? 15 Q. For anything that was requested by 16 the tenant. 17 A. Well, just for our work plan, the 18 procedures that we were going to implement to... 19 Q. Do you recall receiving a list of 20 questions that the tenant had asked? 21 A. Yes. 22 Q. And is that something that you 23 participated in responding to? 24 A. Yes. 25 Q. Is this typical on a job, that you</p>	<p style="text-align: right;">69</p> <p>1 A. Just to, I think -- TuffWrap was 2 installed and to see the sections where we were 3 going to remove the roof to make sure there was no 4 voids between the building, you know, to make sure 5 no pieces can fall in or something like that. 6 Q. Now, was that just before you started 7 the work in December of 2005? 8 A. Yes. 9 Q. And do you recall whether there were 10 any voids? 11 A. No, it was all wrapped in plastic 12 very well. 13 Q. When you made that walk-through, did 14 you see any dust or debris inside the facility from 15 previous work on the roof? 16 A. No. 17 Q. Did anybody point out anyplace that 18 had been affected by previous work on the roof? 19 A. No. 20 Q. Now, do you know whether -- 21 A. I'm sorry. I'm sorry. I have to go 22 back to that question. 23 The representative that walked me 24 through, he actually gave me a dust mask to put 25 on -- well, not a dust mask.</p>

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<p>70</p> <p>1 Q. A surgical mask?</p> <p>2 A. A PP-100, which is -- that means</p> <p>3 there's a possibility of airborne asbestos, so he</p> <p>4 told me to put that on. And then we walked through</p> <p>5 the final area, which was not wrapped in plastic.</p> <p>6 Q. And, again, when you made the</p> <p>7 walk-through, did you see any evidence of dust or</p> <p>8 debris from the previous roof work inside the</p> <p>9 facility?</p> <p>10 A. No.</p> <p>11 Q. Did you have occasion to go back</p> <p>12 inside the facility after you completed your work on</p> <p>13 the roof?</p> <p>14 A. No.</p> <p>15 Q. Did anyone from Slavco Construction</p> <p>16 go inside after you completed the roof removal?</p> <p>17 A. No.</p> <p>18 Q. Do you have an understanding of why</p> <p>19 the plastic was put up by TuffWrap?</p> <p>20 A. As extra precautionary procedures</p> <p>21 so -- just in case there's any kind of dust or</p> <p>22 anything that falls down, to keep it away from their</p> <p>23 work stations or whatever they have.</p> <p>24 Q. So if the work on the roof were to</p> <p>25 cause any dust or debris to enter the inside of the</p>	<p>72</p> <p>1 the work that Slavco did?</p> <p>2 A. I don't recall that.</p> <p>3 Q. You don't recall?</p> <p>4 A. I don't recall.</p> <p>5 Q. You testified that Slavco used a roof</p> <p>6 cutter that has a vacuum with a HEPA filter; is that</p> <p>7 correct?</p> <p>8 A. Yes.</p> <p>9 Q. And that's also for the purpose of</p> <p>10 containing the dust that might be created by the</p> <p>11 roof removal?</p> <p>12 A. Yes.</p> <p>13 Q. So that's another precaution in</p> <p>14 addition to the TuffWrap that is taken to keep the</p> <p>15 dust from getting inside?</p> <p>16 A. Yes.</p> <p>17 Q. And I think you testified that the</p> <p>18 methods that you used on this roof removal were</p> <p>19 actually in excess of the requirements by the New</p> <p>20 Jersey standards; is that true?</p> <p>21 A. Yes.</p> <p>22 Q. Well, why did you use different or</p> <p>23 excessive procedures?</p> <p>24 A. My understanding is to make the</p> <p>25 client happy, basically. They wanted to make sure,</p>
<p>71</p> <p>1 facility, the expectation would be that the plastic</p> <p>2 that TuffWrap put up would catch that?</p> <p>3 A. Yes.</p> <p>4 Q. And, then, do you have any idea what</p> <p>5 TuffWrap does once it has all this plastic full of</p> <p>6 dust and debris, theoretically?</p> <p>7 A. TuffWrap should, if it's asbestos,</p> <p>8 should out-source it and have somebody clean the</p> <p>9 top, or, you know, as it's coming down, have</p> <p>10 negative air units to trap any kind of airborne</p> <p>11 material if anything went through the roof.</p> <p>12 Q. Now, did you observe whether, while</p> <p>13 your work was ongoing, any dust was getting inside</p> <p>14 the premises?</p> <p>15 A. We had no complaints. There was air</p> <p>16 monitoring, I think from Eagle and also from EHI,</p> <p>17 and there were no complaints.</p> <p>18 Q. About the quality of the air?</p> <p>19 A. Yes.</p> <p>20 Q. Did anybody tell you that dust or any</p> <p>21 kind of debris from the roof was entering the</p> <p>22 facility?</p> <p>23 A. At that point, no.</p> <p>24 Q. Did they tell you afterwards that any</p> <p>25 dust or debris entered the facility as a result of</p>	<p>73</p> <p>1 you know, there would be no dust issues inside the</p> <p>2 building. And at that meeting that we had where EHI</p> <p>3 was there, Badger Roofing, Barry and</p> <p>4 representatives, somebody brought up a question, you</p> <p>5 know, is there anything, you know, you can do</p> <p>6 better; so we told them about New York City</p> <p>7 regulations. I walked out to my car, got out the</p> <p>8 New York City regulations and brought it in, which</p> <p>9 is a better standard; it's a higher standard.</p> <p>10 Q. And that's what you were authorized</p> <p>11 to do?</p> <p>12 A. Yes.</p> <p>13 Q. And, again, that was an attempt to</p> <p>14 restrict or prevent any dust or debris from getting</p> <p>15 inside the facility?</p> <p>16 A. Yes.</p> <p>17 Q. Now, I think before, in response to a</p> <p>18 question, you said that whenever you encounter a</p> <p>19 roof removal on a roof that's 15 years or older, you</p> <p>20 inquire as to whether it contains asbestos</p> <p>21 materials; is that correct?</p> <p>22 A. Yes.</p> <p>23 Q. And why is that?</p> <p>24 A. Just to make sure we implement the</p> <p>25 proper procedures, we file notification, you know,</p>

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<p style="text-align: right;">74</p> <p>1 we use -- you know respiratory programs.</p> <p>2 Q. I understand that, and I guess I</p> <p>3 didn't ask the right question.</p> <p>4 Why does it make a difference if a</p> <p>5 roof is 15 years old or older?</p> <p>6 A. Well, roofing -- I think asbestos</p> <p>7 roofing was stopped producing in the late '70s, and</p> <p>8 somebody had a grandfather clause, so if the roof</p> <p>9 is -- if it is an older roof, it has the possibility</p> <p>10 of containing asbestos. If it's a newer roof, you</p> <p>11 know, a shingle roof or plywood roof within the last</p> <p>12 five or ten years, it has a possibility of not</p> <p>13 containing asbestos. Can it? There's still a</p> <p>14 possibility.</p> <p>15 Q. If a roof is 25 or 30 years old, is</p> <p>16 it likely that it contains some sort of asbestos</p> <p>17 material?</p> <p>18 A. Yes.</p> <p>19 Q. And is that common knowledge in your</p> <p>20 industry?</p> <p>21 A. Yes.</p> <p>22 Q. Would you undertake a roof removal</p> <p>23 project of a roof that's 25 or 30 years old without</p> <p>24 determining whether it contains asbestos material?</p> <p>25 A. No, unless somebody states it's</p>	<p style="text-align: right;">76</p> <p>1 CERTIFICATE</p> <p>2</p> <p>3 I, MARGO HRONCICH, a Notary Public</p> <p>4 and Certified Shorthand Reporter of the State of New</p> <p>5 Jersey, do hereby certify that prior to the</p> <p>6 commencement of the examination, MICHAEL SOLAKOV was</p> <p>7 duly sworn by me to testify to the truth, the whole</p> <p>8 truth and nothing but the truth.</p> <p>9 I DO FURTHER CERTIFY that the</p> <p>10 foregoing is a verbatim transcript of the testimony</p> <p>11 as taken stenographically by and before me at the</p> <p>12 time, place and on the date hereinbefore set forth,</p> <p>13 to the best of my ability.</p> <p>14 I DO FURTHER CERTIFY that I am</p> <p>15 neither a relative nor employee nor attorney nor</p> <p>16 counsel of any of the parties to this action, and</p> <p>17 that I am neither a relative nor employee of such</p> <p>18 attorney or counsel, and that I am not financially</p> <p>19 interested in the action.</p> <p>20</p> <p>21</p> <p>22</p> <p>23 MARGO HRONCICH</p> <p>24 Certified Shorthand Reporter and</p> <p>25 Notary Public of the State of</p> <p>New Jersey</p>
<p style="text-align: right;">75</p> <p>1 asbestos and that's it, there's no survey, and we</p> <p>2 already assume it's asbestos.</p> <p>3 Q. But if an owner or an architect or an</p> <p>4 engineer were to retain you to remove a roof and not</p> <p>5 tell you, or, in fact, not mention at all whether it</p> <p>6 contained asbestos, would you just remove it or</p> <p>7 would you make the necessary inquiries?</p> <p>8 A. Necessary inquiries.</p> <p>9 MR. MAHER: I have no further</p> <p>10 questions, thank you.</p> <p>11 MR. VINICOMBE: Thank you.</p> <p>12 (The witness is excused.)</p> <p>13 (The deposition is concluded at</p> <p>14 approximately 11:29 a.m.)</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">77</p> <p>1 LAWYER'S NOTES</p> <p>2 PAGE LINE</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

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EXHIBIT 10

Bristol vs. Somerville: Dep. of Robert Post: 1-26-07

Robert Cirillo, Inc.

Page 1 to Page 61

CONDENSED TRANSCRIPT AND CONCORDANCE
PREPARED BY: ROBERT J. CIRILLO, CSR

ROBERT CIRILLO, INC.
182 Columbia Turnpike
Florham Park, NJ 07932
Phone: 973-740-1331
FAX: 973-992-7568

EXHIBIT

tabbles

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Page 1

(1) AMERICAN ARBITRATION ASSOCIATION
 (2) -----
 (3) BRISTOL-MYERS SQUIBB COMPANY, : DEPOSITION UPON
 (4) Claimant, :
 (5) V. : ORAL EXAMINATION
 (6) SOMERVILLE FIDELCO :
 (7) ASSOCIATES, L.P., : ROBERT POST
 (8) Respondent. :
 (9) -----

(10)
 (11) TRANSCRIPT of the deposition of ROBERT
 (12) POST, witness called for Oral Examination in the
 (13) above-entitled action, said proceedings being
 (14) conducted pursuant to Rules Governing the American
 (15) Arbitration Association, by and before DONNA
 (16) BRUNCK, Notary Public and Certified Shorthand
 (17) Reporter, License No. XI01487, at the offices of
 (18) DRINKER, BIDDLE & REATH, LLP, 105 College Road
 (19) East, P.O. Box 627, Princeton, New Jersey
 (20) 08542-0627, on January 26, 2007, commencing at
 (21) 10:00 a.m.

(22)
 (23) ROBERT CIRILLO, INC.
 Certified Shorthand Reporters
 (24) 182 Columbia Turnpike
 Florham Park, New Jersey 07932
 (25) (973) 740-1331

Page 2

(1) APPEARANCES:
 (2)
 (3) DRINKER, BIDDLE & REATH, LLP
 (4) 105 College Road East
 (5) P.O. Box 627
 (6) Princeton, New Jersey 08542-0627
 (7) BY: CHARLES J. VINICOMBE, ESQ.
 (8) Attorneys for the Claimant
 (9)
 (10) GREENBAUM, ROWE, SMITH & DAVIS LLP
 (11) Metro Corporate Campus One
 (12) P.O. Box 5600
 (13) Woodbridge, New Jersey 07095
 (14) BY: LAWRENCE P. MAHER, ESQ.
 (15) Attorneys for the Respondent
 (16)
 (17)
 (18)
 (19)
 (20)
 (21)
 (22)
 (23)
 (24)
 (25)

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(1) ROBERT POST, 457 Barrymore Place, North Brunswick,
 (2) New Jersey 08902, having been first duly sworn.
 (3) according to law, testifies as follows:
 (4)
 (5) DIRECT EXAMINATION BY MR. MAHER:
 (6) Q. Good morning, Mr. Post. My name is
 (7) Lawrence Maher. I'm with the law firm of
 (8) Greenbaum, Rowe, Smith & Davis. We represent
 (9) Somerville Fidelco in this arbitration proceeding.
 (10) with Bristol Myers Squibb. We are here to conduct
 (11) your deposition.
 (12) Have you ever been deposed before, Mr. Post?
 (13) A. No, I have not.
 (14) Q. I'll give you a few instructions and
 (15) if you have any questions about the instructions,
 (16) by all means, let me know, but I'll be asking you
 (17) questions and you'll be responding to the best of
 (18) your ability. The court reporter will be taking
 (19) down the questions and the answers and will create
 (20) a transcript, a verbatim transcript of what we say
 (21) here. As a result, I have to let you finish your
 (22) answers before I speak and you need to let me
 (23) finish my questions before you respond. Otherwise,
 (24) the transcript will get garbled or the court
 (25) reporter will run screaming out of the room or

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(1) something like that.
 (2) If you don't understand a question or if you
 (3) would like me to rephrase it or explain it, by all
 (4) means let me know. Otherwise, when I ask you a
 (5) question and you respond, I'll assume that you
 (6) understood the question and you are responding to
 (7) the best of your ability.
 (8) Obviously you are under oath and anything
 (9) that you say in this transcript can be used later
 (10) on in the proceedings and, you know, you need to be
 (11) aware of that.
 (12) Is there any reason, do you have any physical
 (13) infirmities or anything that would keep you from
 (14) being able to understand my questions, hear my
 (15) questions and respond to them?
 (16) A. No.
 (17) Q. Mr. Post, you are employed currently
 (18) at Bristol-Myers Squibb?
 (19) A. Yes.
 (20) Q. How long have you been there?
 (21) A. 39 years.
 (22) Q. What did you do before that?
 (23) A. United States Marine.
 (24) Q. What's your current position?
 (25) A. Facilities supervisor.

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- (1) Q. At any particular location?
- (2) A. **Somerville, Hamilton and Hillside.**
- (3) Q. And do you have a specific office
- (4) that you work from?
- (5) A. **I have an office at the Plainsboro**
- (6) **facility.**
- (7) Q. But you are in charge of the other
- (8) three facilities that you've described?
- (9) A. **The other three facilities, yes.**
- (10) Q. Now, generally what is your
- (11) responsibility as facilities coordinator?
- (12) A. **I'm responsible for the physical**
- (13) **facility, the operation, maintenance, just the**
- (14) **general facility itself.**
- (15) Q. The building?
- (16) A. **Yes, and dealing with the people that**
- (17) **work in the building.**
- (18) Q. Well, specifically with respect to
- (19) the Somerville facility, that's the building that's
- (20) located at 76 Fourth Street in Somerville; is that
- (21) correct?
- (22) A. **Yes, it is.**
- (23) Q. And that's a building that you, that
- (24) Bristol-Myers rents from my client, Somerville
- (25) Fidelco; is that correct?

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- (1) A. **That's correct.**
- (2) Q. Now, do you have any dealings at all
- (3) with representatives of Somerville Fidelco in your
- (4) capacity at Bristol-Myers?
- (5) A. **No, I do not.**
- (6) Q. Were you involved at all in
- (7) negotiating any aspects of the lease or any
- (8) extensions of the lease?
- (9) A. **No.**
- (10) Q. Do you recall when Bristol-Myers
- (11) first occupied the Somerville facility?
- (12) A. **No, I do not.**
- (13) Q. Were you in charge of the Somerville
- (14) facility when Bristol-Myers first took occupancy?
- (15) A. **No.**
- (16) Q. How long have you been responsible
- (17) for that facility?
- (18) A. **Approximately two years.**
- (19) Q. Approximately two years. Would that
- (20) be approximately January of 2005?
- (21) A. **I was given the assignment**
- (22) **approximately two weeks before the incident**
- (23) **happened.**
- (24) Q. So the incident we are talking about
- (25) is the September 2005 roof removal that's the

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- (1) subject of this arbitration?
- (2) A. **Yes.**
- (3) Q. So approximately two weeks before
- (4) that, you were assigned to the Somerville facility?
- (5) A. **That's correct.**
- (6) Q. Who was responsible for that facility
- (7) before you?
- (8) A. **Dan Mutter. He was from the, a**
- (9) **supervisor from the Hillside facility.**
- (10) Q. And do you have any idea how long he
- (11) was responsible for Somerville before you were
- (12) assigned there?
- (13) A. **No, I do not.**
- (14) Q. Did you visit the Somerville facility
- (15) before the incident in September of 2005?
- (16) A. **Yes, I did.**
- (17) Q. How often?
- (18) A. **I believe it was three visits. I had**
- (19) **to get a TB test and I had to take a physical to**
- (20) **wear a respirator before I could physically work in**
- (21) **the facility, because it's a vivarium.**
- (22) Q. Excuse me, it's a what?
- (23) A. **Vivarium.**
- (24) Q. Can you spell that, please?
- (25) A. **V-I-V-A-R-I-U-M, vivarium.**

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- (1) Q. Can you tell me what that is? I
- (2) apologize. I'm not familiar with the word.
- (3) A. **It's an animal facility.**
- (4) Q. Do you know what Bristol-Myers does
- (5) in that facility?
- (6) A. **Houses monkeys.**
- (7) Q. As some sort of test animals or
- (8) something?
- (9) A. **It's a quarantine facility. That's**
- (10) **all I know.**
- (11) Q. Who would know more about what goes
- (12) on at that facility, what - strike that.
- (13) What representative of Bristol-Myers would
- (14) know more about what goes on in that facility?
- (15) A. **The manager that's there, John Deck.**
- (16) Q. So before you were permitted to go
- (17) into the premises, you had to be tested medically?
- (18) A. **That's correct.**
- (19) Q. You mentioned a respirator. What was
- (20) the requirement for a respirator?
- (21) A. **Requirement for the respirator is I**
- (22) **have to have a physical in the BMS medical**
- (23) **department before I could wear any respirator at**
- (24) **any facility. It's company policy.**
- (25) Q. Why would you wear a respirator, if

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- (1) you know?
- (2) **A. If I failed the TB test, I would have**
- (3) **to wear a respirator any time that I'm in the**
- (4) **facility.**
- (5) Q. I'm sorry, I'm probably confusing
- (6) you because I know I'm confusing myself. I think
- (7) you testified that after you were assigned the
- (8) responsibility of the Somerville facility, you
- (9) visited it two or three times prior to the incident
- (10) in September of 2005. Is that what you said?
- (11) **A. That's correct.**
- (12) Q. And I think you also said that you
- (13) had to take a TB test; is that correct?
- (14) **A. That's correct.**
- (15) Q. That was administered at
- (16) Bristol-Myers?
- (17) **A. Yes.**
- (18) Q. And I thought you said that you had
- (19) to wear a respirator. Is that what you testified
- (20) to?
- (21) **A. Once I'm TB tested, it takes three**
- (22) **days for the test. If I come back positive, I**
- (23) **would have to wear a respirator any time I'm in**
- (24) **that facility. If it comes back negative, I do not**
- (25) **have to wear a respirator. If I go into any animal**

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- (1) **room that's occupied with animals for any**
- (2) **facilities reason; I have to wear a respirator in**
- (3) **the room.**
- (4) Q. And that's some sort of a Bristol
- (5) Myers policy?
- (6) **A. That's correct.**
- (7) Q. With respect to that laboratory?
- (8) **A. Yes.**
- (9) Q. Would Mr. Deck know more about that?
- (10) **A. Yes, his group sets policy.**
- (11) Q. So prior to the roof incident in
- (12) September of 2005, did you make any kind of an
- (13) inspection of the facility in Somerville?
- (14) **A. No.**
- (15) Q. What was the purpose of any of your
- (16) visits prior to the roof incident?
- (17) **A. Introduction to John Deck, to know**
- (18) **physically where the facility is, and to meet the**
- (19) **outgoing Dan Mutter.**
- (20) Q. And you did those things?
- (21) **A. That's correct.**
- (22) Q. Now, once you took the responsibility
- (23) for this facility, did you have responsibility for
- (24) security there?
- (25) **A. No, that's a separate department**

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- (1) **within Bristol-Myers Squibb...**
- (2) Q. Did you have responsibility for the
- (3) parking lot - let me rephrase that:
- (4) Would you be responsible for the maintenance
- (5) and repair of the parking lot at that facility once
- (6) you took over the Somerville property?
- (7) **A. No.**
- (8) Q. Would that be somebody else's
- (9) responsibility?
- (10) **A. I believe it would be the landlord's**
- (11) **responsibility.**
- (12) Q. Do you know that for a fact?
- (13) **A. No, I do not.**
- (14) Q. Would you know whether you personally
- (15) would be responsible for maintaining the interior
- (16) of the property? Would that be your responsibility
- (17) as facilities supervise or --
- (18) **A. Interior we keep it up to BMS**
- (19) **standards.**
- (20) Q. Is that your responsibility?
- (21) **A. That would be my responsibility.**
- (22) Q. How would you do that? Would you
- (23) personally make inspections or would somebody just
- (24) tell if you there were maintenance or repair
- (25) requirements?

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- (1) **A. It would be either generated by the**
- (2) **customer in the building or my observations.**
- (3) Q. Do you know whether you had
- (4) responsibility for the roof at the building?
- (5) **A. No.**
- (6) Q. Do you know whether you had
- (7) responsibility for the windows and doors at the
- (8) building?
- (9) **A. I would say no.**
- (10) Q. So if a window were broken by
- (11) accident, you don't know whether - strike that.
- (12) If the window were broken by accident, would
- (13) Bristol-Myers have the responsibility to replace
- (14) the window?
- (15) **A. I don't know. I would have to make**
- (16) **calls.**
- (17) Q. In September of 2005, were you
- (18) informed that the roof at that facility was going
- (19) to be replaced?
- (20) **A. I had heard about it through the**
- (21) **occupants of the facility.**
- (22) Q. Were you included in any way in the
- (23) arrangements to replace the roof other than hearing
- (24) about it?
- (25) **A. No.**

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- (1) Q. Do you know who was involved in
(2) making arrangements to replace the roof?
(3) A. I would say our realty group.
(4) Q. What is the realty group?
(5) A. It's a separate entity with, inside
(6) Bristol-Myers. The one that actually talks to the
(7) landlord, renews the contracts.
(8) Q. So there's a separate group that
(9) deals with the lease and the landlord and repairs
(10) and things like that that are going to happen at
(11) your facility?
(12) A. Of the structure, yes.
(13) Q. And who in the realty group do you
(14) know that would have been dealing with the roofer?
(15) A. I don't know. I wasn't involved in
(16) that, so I don't know.
(17) Q. Who is the head of the realty group
(18) in New Jersey, if you know?
(19) A. I don't know.
(20) Q. Is there - do you have a contact at
(21) the realty group that you deal with?
(22) MR. VINICOMBE: With respect to that
(23) facility?
(24) MR. MAHER: Yes.
(25) A. I would say Jack Chapman.

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- (1) Q. Is Mr. Chapman in the realty group?
(2) A. Yes.
(3) Q. So other than hearing from the
(4) occupants, you didn't have any role in arranging
(5) the roof repair on the Somerville facility?
(6) A. No, none whatsoever.
(7) Q. Did you know the roofer was coming on
(8) an appointed date?
(9) A. I was advised by e-mail.
(10) Q. Now, is that something that you would
(11) supervise as part of your responsibility for that
(12) facility?
(13) A. No, because -
(14) MR. VINICOMBE: Objection to the form
(15) of the question. Go ahead. I just want to give my
(16) objection to the form of the question. You can
(17) answer it.
(18) A. No, because it wasn't my
(19) responsibility. The roof was not my
(20) responsibility.
(21) Q. So -
(22) A. It wasn't my project. Let me
(23) rephrase that. It wasn't my project.
(24) Q. It wasn't your project. Someone else
(25) at Bristol-Myers would have been responsible to

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- (1) coordinate for the replacement of that roof?
(2) A. Yes.
(3) Q. Would that have been Mr. Chapman, do
(4) you know?
(5) A. That, I don't know.
(6) Q. Who's Robert Pappa?
(7) A. He's a manager in the facilities
(8) group in Princeton or in Plainsboro.
(9) Q. Now, is that your group?
(10) A. Yes.
(11) Q. Do you know whether he would have had
(12) any responsibility for involvement in the roof
(13) replacement?
(14) A. I don't believe he had any, because
(15) we were taken by surprise when the facility was,
(16) you know, the roof project started.
(17) Q. So your group and you personally had
(18) no involvement in coordinating or supervising the
(19) roof project?
(20) A. No.
(21) Q. Are you responsible for cleaning
(22) crews or regular maintenance people at that
(23) facility?
(24) A. Regular maintenance people.
(25) Q. How about the people who come in -

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- (1) let me withdraw that.
(2) Are there outside contractors that come in
(3) and do any cleaning at that facility?
(4) A. Yes, there is an outside contractor
(5) that performs the cleaning at the facility.
(6) Q. Is that a regular function?
(7) A. Yes, it is.
(8) Q. Is that outside contractor someone
(9) that you are responsible for?
(10) A. I'm responsible for the product. I
(11) do not negotiate the contract for them. For
(12) cleanliness in the facility, I am responsible. I
(13) do not negotiate the contract.
(14) Q. So if it's determined that they are
(15) not doing a good job, you find out about it and you
(16) interact with that outside contractor. Is that
(17) fair to say?
(18) A. That's correct.
(19) Q. Is it also fair to say that you
(20) really were not or are not familiar with what the
(21) overall condition of that facility was prior to the
(22) September roof project?
(23) A. I would say yes. I was informed the
(24) roof leaked.
(25) Q. No, I don't mean the roof and if I

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- (1) confused you I apologize. It wasn't a great
 (2) question. But as I understand it, since you were
 (3) only recently assigned the facility, is it fair to
 (4) say that you didn't make any kind of a
 (5) comprehensive inspection of the inside of the
 (6) property before the roof incident?
 (7) **A. Yes.**
 (8) **Q.** So you really wouldn't be familiar
 (9) with the general cleanliness in all the nooks and
 (10) crannies of that facility prior to September of
 (11) 2005?
 (12) **A. Yes.**
 (13) **Q.** Yes, you would not?
 (14) **A. I would not.**
 (15) **Q.** When you make an inspection or visit
 (16) the facility, do you make any sort of notes or
 (17) written reports?
 (18) **A. No.**
 (19) **Q.** Now, when did you first become aware
 (20) of a problem with respect to the roof removal at
 (21) that property?
 (22) **A. I was in Plainsboro and we received a**
 (23) **phone call that the facility was full of dust.**
 (24) **Q.** Do you recall who made that call?
 (25) **A. John Deck.**

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- (1) **Q.** And as a result of that call, did you
 (2) personally take any action?
 (3) **A. I got in my car, drove from**
 (4) **Plainsboro up to Somerville.**
 (5) **Q.** And what did you find there?
 (6) **A. Dust.**
 (7) **Q.** Was the roofer still on the job?
 (8) **A. Yes, they were.**
 (9) **Q.** And what sort of dust did you see?
 (10) **A. It was dust in the air and dust all**
 (11) **over the rear of the facility.**
 (12) **Q.** Now, can you generally describe this?
 (13) Is this a multi-floor facility?
 (14) **A. It's a single story.**
 (15) **Q.** And when you say the rear of the
 (16) facility, how much of the facility would that
 (17) involve?
 (18) **A. Approximately 25 percent.**
 (19) **MR. MAHER:** Off the record.
 (20) (Discussion off the record.)
 (21) **Q.** I am going to show you a document
 (22) that was produced by counsel for Bristol-Myers. It
 (23) contains a Bates stamp number and I want to refer
 (24) to this and any other exhibits probably that I show
 (25) you by that Bates stamp number.

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- (1) This has been stamped BMS 16666. It appears
 (2) to be some sort of a floor plan. Can you tell me
 (3) whether that is generally a floor plan of the
 (4) Somerville facility?
 (5) **A. This is a floor plan of the facility.**
 (6) **Q.** Have you seen this before?
 (7) **A. Yes, I have.**
 (8) **Q.** Do you know where this came from?
 (9) **A. I was given this when I took over the**
 (10) **responsibilities of the facility.**
 (11) **Q.** So you testified that a percentage of
 (12) the facility was affected by dust. Is there a way
 (13) that you can describe or delineate on this floor
 (14) plan what portion of the facility was covered by
 (15) the dust? Do you want to draw on it?
 (16) **A. I can name things or we can draw on**
 (17) **it. It's your choice.**
 (18) **Q.** Whatever is easier for you.
 (19) **MR. VINICOMBE:** Would you like to
 (20) draw?
 (21) **THE WITNESS:** No.
 (22) **A. The loading dock.**
 (23) **Q.** Where are we starting? Which corner,
 (24) bottom left?
 (25) **A. Right where BMS 01666 is. The**

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- (1) **loading dock small room labeled storage, 107.**
 (2) **corridor, 106 corridor, that was the area.**
 (3) **Q.** Now, what about some of the boxed off
 (4) rooms. There's a bedding and feed storage and a
 (5) lunchroom and things like that. Do you know
 (6) whether those were affected by the dust?
 (7) **A. The bedding and feed storage has a**
 (8) **roof on top of it with inside the facility.**
 (9) **Without going up there and looking, I didn't go up**
 (10) **there and look.**
 (11) **Q.** It has like a drop ceiling?
 (12) **A. It's like a room built within the**
 (13) **warehouse, a box within the warehouse.**
 (14) **Q.** I understand. How about the
 (15) lunchroom?
 (16) **A. The lunchroom has a drop ceiling.**
 (17) **Q.** And these other areas, the loading
 (18) dock and the storage and the corridors, they do not
 (19) have a drop ceiling or any other ceiling beneath
 (20) the building's ceiling?
 (21) **A. That's correct. You can see the roof**
 (22) **deck if you look up.**
 (23) **Q.** How would you describe the dust that
 (24) you saw there?
 (25) **A. It was just dust all over and then**

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- (1) there was chunks and pieces of what I thought was
 (2) roofing materials.
 (3) Q. When you talk about dust, are we
 (4) talking about run of the mill grey household dust
 (5) or was there some other consistency to it?
 (6) A. A heavier brown dust.
 (7) Q. And then you described some other
 (8) matter?
 (9) A. There was pieces that looked like
 (10) they had asphalt, black tar chunks out, especially
 (11) in the storage room that is open to the deck also,
 (12) and there were shelves in there, and everything
 (13) that was on the shelves was covered with this dust
 (14) and chunks of roofing.
 (15) Q. Did you ever determine, you
 (16) personally or did you ever obtain any reports or
 (17) opinions from anybody as to where the dust came
 (18) from?
 (19) A. When I arrived there, I was standing
 (20) in the loading dock area and I could see daylight
 (21) up through the decking, so that means that there
 (22) was holes in the decking.
 (23) Q. There were holes in the decking over
 (24) the loading dock?
 (25) A. Yes, and over the storage room and

- (1) asked for the lead or who was running the project
 (2) and I spoke to him. My concern was seeing
 (3) daylight. I was concerned about making the
 (4) facility waterproof in case we had rain. They said
 (5) they were not going to strip anymore. They were
 (6) going to put down the new insulation and put down
 (7) the new waterproof barrier and we would be
 (8) watertight. That was my main concern.
 (9) Q. Did they acknowledge at that point
 (10) that the holes were there?
 (11) A. I didn't discuss it. I just was
 (12) concerned about no dust in the facility and making
 (13) the building watertight.
 (14) Q. But in that conversation, did you say
 (15) that you noticed there are holes in the decking?
 (16) A. No, I did not.
 (17) Q. Did they continue and put on the new
 (18) barrier and cover up the holes?
 (19) A. Yes, they did.
 (20) Q. Was that done that same day?
 (21) A. Yes, it was.
 (22) Q. How long did you stay there that day?
 (23) A. Probably until it got dark.
 (24) Q. Do you recall what day that was?
 (25) A. No, I do not.

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- (1) over the lunchroom.
 (2) Q. How would you describe the holes?
 (3) A. All I remember is seeing daylight.
 (4) Q. But I mean are we talking about pin
 (5) holes or talking about gaping holes in the decking?
 (6) A. Small holes.
 (7) Q. And you wouldn't know whether those
 (8) were there or how long those holes were there?
 (9) A. No.
 (10) Q. When you looked up and saw that there
 (11) were holes over these rooms, did you see whether
 (12) there was any dust or matter coming in at the time?
 (13) A. No. The roofing contractor had
 (14) finished stripping the roof.
 (15) Q. And what, if anything else, did you
 (16) observe when you first got there and made your
 (17) inspection?
 (18) A. That's all I observed was the dust
 (19) and pieces of roofing that was in the facility on
 (20) the floors and on the shelving.
 (21) Q. At that time did you speak to the
 (22) roofing contractor?
 (23) A. Yes, I did.
 (24) Q. And do you recall who you spoke with?
 (25) A. I went up on the roof and I believe I

- (1) Q. But it was September 2005?
 (2) A. Yes.
 (3) Q. Did you take any action with respect
 (4) to the existence of the dust and the other material
 (5) that had infiltrated the property?
 (6) A. I did not. Our EH&S department was
 (7) informed of the dust and they were going to sample
 (8) it. They made a recommendation that everybody
 (9) inside the facility put on the proper PPE.
 (10) Q. Now, what department is that, EHS?
 (11) A. Environmental health and safety.
 (12) Q. Is that a department within
 (13) Bristol-Myers?
 (14) A. Yes, it is.
 (15) Q. Who notified them of the existence of
 (16) this dust?
 (17) A. John Deck.
 (18) Q. And did they send somebody out there?
 (19) A. Yes, they did.
 (20) Q. Do you know who that was?
 (21) A. Barbara Owen.
 (22) Q. You mentioned PPE. What does that
 (23) stand for?
 (24) A. Personal protective equipment.
 (25) Q. Is that a respirator?

BSA

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- (1) A. That was a Tyvek suit.
- (2) Q. One of those white suits?
- (3) A. One of those white suits, mask,
- (4) gloves, so we were 100 percent protected.
- (5) Q. And did that happen the day you were
- (6) there?
- (7) A. Yes, it did.
- (8) Q. How many people were in the building
- (9) that day?
- (10) A. I do not know how many people were in
- (11) the building that day. When I arrived it was John
- (12) Deck, the manager, myself who was in the building.
- (13) It was only two of us.
- (14) Q. There were no employees there at that
- (15) time?
- (16) A. Not at that time.
- (17) Q. Do you know whether they had been
- (18) sent home?
- (19) A. I believe they had been sent home.
- (20) Q. Do you know who made that decision?
- (21) A. No, I do not.
- (22) Q. So you were notified that there was
- (23) dust and you drove to the facility. When you got
- (24) there, had the employees already been sent home?
- (25) A. They weren't on the facility, so I'm

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- (1) assuming they were sent home.
- (2) Q. Did you have a role, after that day,
- (3) did you have a continuing role at the facility over
- (4) the next few days?
- (5) A. Yes.
- (6) Q. Did you go there?
- (7) A. Every day.
- (8) Q. And what was the situation there
- (9) every day?
- (10) A. The roof work was suspended.
- (11) Q. Who made that decision?
- (12) A. I don't know. I believe it was EH&S
- (13) department. Plans were made to clean up the
- (14) facility, remove the dust from the facility and to
- (15) sample the dust.
- (16) Q. Was that function your
- (17) responsibility?
- (18) A. No, it was not.
- (19) Q. Whose responsibility was that?
- (20) A. Environmental health and safety.
- (21) Q. That's Barbara Owen?
- (22) A. Yes.
- (23) Q. Were the employees told to stay home
- (24) each of those days?
- (25) A. No.

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- (1) Q. Did they come in?
- (2) A. Yes, they did. Gowned up in moon
- (3) suits, took care of their responsibilities.
- (4) Q. Now, approximately how many people
- (5) were -- strike that.
- (6) Did you continue going there each day after
- (7) this incident?
- (8) A. Yes, I did.
- (9) Q. For how long?
- (10) A. Until a clean-up was completed and
- (11) the building was certified asbestos free.
- (12) Q. Do you know when that was?
- (13) A. The exact date, I do not know.
- (14) Q. Do you know the month?
- (15) A. Probably February or March of '06.
- (16) Q. What did you do in Somerville every
- (17) day when you went there?
- (18) A. I was responsible for running the
- (19) clean-up at the facility during that period.
- (20) Q. And how did you do that?
- (21) A. Bristol-Myers had hired contractors
- (22) to come in and clean up the interior facility.
- (23) Q. Did that start right away after the
- (24) incident?
- (25) A. Within two to three weeks.

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- (1) Q. And do you know who the contractors
- (2) were?
- (3) A. I need a list, but the main
- (4) contractor was Bristol Environmental.
- (5) Q. So were they on premises within a few
- (6) weeks after the September roof incident?
- (7) A. Yes, they were.
- (8) Q. And was it your responsibility to
- (9) oversee their clean-up?
- (10) A. Yes, it was.
- (11) Q. Was Barbara Owen involved in that at
- (12) all?
- (13) A. Yes, she was.
- (14) Q. What did the clean-up consist of?
- (15) Did they vacuum up the dust?
- (16) A. The floors and ceilings were removed.
- (17) Q. The floors --
- (18) A. I'm sorry, the ceilings were removed.
- (19) Q. Why were the ceilings removed?
- (20) A. Because the ceilings had debris on
- (21) top of them, dust on top of them, so all the
- (22) ceilings were removed. They came in with lifts and
- (23) started cleaning from the decking on down.
- (24) Q. Now, when you say the ceilings were
- (25) removed, were these drop ceilings that were some

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- (1) sort of, forgive me, but, you know, the typical
 (2) tiles that you just lift out?
 (3) **A. Typical two by four tiles.**
 (4) **Q. So those were taken down?**
 (5) **A. In some areas they were.**
 (6) **Q. And the clean-up crew then went up**
 (7) **inside the ceiling?**
 (8) **A. Yes, they did.**
 (9) **Q. And what did they do up there?**
 (10) **A. With hepa vacuums and wet rags and**
 (11) **everything started cleaning out the facility,**
 (12) **cleaning areas.**
 (13) **Q. Whatever dust was up there, they**
 (14) **cleaned it out?**
 (15) **A. Yes.**
 (16) **Q. Do you know whether that dust was**
 (17) **dust that was caused by the roof replacement?**
 (18) **A. Yes.**
 (19) **Q. You do know that?**
 (20) **A. I took pictures in a lot of areas.**
 (21) **Q. How do you know that that was dust**
 (22) **that was cause from the work on the roof?**
 (23) **A. Because it was the same brown dust**
 (24) **and roofing particles.**
 (25) **Q. Now you said you took pictures. Did**

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- (1) you take a lot of pictures?
 (2) **A. Quite a few.**
 (3) **Q. I have a lot of pictures that I**
 (4) **didn't know where it came from, so I'm going to ask**
 (5) **you and I don't know if they've been - they have.**
 (6) **They have been Bates stamped as well, I'm going to**
 (7) **ask you first of all whether these are the pictures**
 (8) **that you described?**
 (9) **MR. VINICOMBE: Maybe we can give a**
 (10) **range of the Bates numbers if that's okay.**
 (11) **MR. MAHER: Yes.**
 (12) **MR. VINICOMBE: The range is BMS**
 (13) **01216. Appears that the beginning of the Bates**
 (14) **range is BMS 01166 and the end of the range is -**
 (15) **strike that too.**
 (16) **MR. MAHER: I thought they were in**
 (17) **order.**
 (18) **MR. VINICOMBE: No, they weren't.**
 (19) **I'll straighten it out. Try it one more time. BMS**
 (20) **1165 through BMS 1249.**
 (21) **Q. Now, Mr. Post you are looking at some**
 (22) **colored pictures that were provided to us by**
 (23) **counsel. Did you take these pictures?**
 (24) **A. I took some of them. I physically**
 (25) **took some of them. I was aware that, I'm aware**

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- (1) **that the other ones were taken.**
 (2) **Q. Do you know when they were taken?**
 (3) **A. There are dates on the front of the**
 (4) **photos and every photo that I took had a date on**
 (5) **it. I'm just looking through and seeing where my**
 (6) **photos start. BMS 01212 to BMS 01249.**
 (7) **Q. You took the photos that you just**
 (8) **described in that Bates stamp range?**
 (9) **A. That's correct.**
 (10) **Q. What was the purpose for taking those**
 (11) **photos?**
 (12) **A. To show what was in the facility,**
 (13) **what was going on at the facility.**
 (14) **Q. Do you mind if I come around to your**
 (15) **side since I only have the one set of photos?**
 (16) **A. All right, sorry. This is the**
 (17) **roofer's equipment on the roof, the mechanical**
 (18) **strippers that they used.**
 (19) **MR. VINICOMBE: Just for the record.**
 (20) **MR. MAHER: BMS 1212 through BMS**
 (21) **1215.**
 (22) **Q. Did you say there are dates on each**
 (23) **of those photos?**
 (24) **A. Not on these.**
 (25) **Q. Do you recall when you took those?**

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- (1) **A. No, I don't.**
 (2) **Q. Well, would it have been in close**
 (3) **proximity to the problem?**
 (4) **A. Yes.**
 (5) **Q. What is BMS 1216?**
 (6) **A. This is one of the roof leaks that**
 (7) **ran down the rear wall near the rear loading dock.**
 (8) **Q. Now, this seems to be dated January**
 (9) **16, 2006?**
 (10) **A. This is when I started taking the**
 (11) **photos of - with a new digital camera.**
 (12) **Q. This is the wall of the loading dock?**
 (13) **A. That's the rear loading dock. Would**
 (14) **be right here next to the electrical equipment**
 (15) **room.**
 (16) **Q. And do you know how long - the**
 (17) **photograph obviously depicts some sort of a**
 (18) **staining on the wall. Do you know how long that**
 (19) **was there?**
 (20) **A. No, I do not.**
 (21) **Q. Is it possible that was there as a**
 (22) **result of the leaks in the roof that caused the**
 (23) **roof to be replaced to begin with?**
 (24) **A. This was the original cause to have**
 (25) **the roof replaced.**

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- (1) Q. So this BMS 1216 is not to your
 (2) knowledge intended to depict something that
 (3) happened during the roof replacement?
 (4) A. No.
 (5) Q. Then you are looking at BMS 1217 and
 (6) can you tell me what that is?
 (7) A. This is a picture of an animal room
 (8) where they have sealed drains with plastic and
 (9) sealed the ventilation system with plastic before
 (10) they cleaned the room so that nothing could go down
 (11) in the sewage or get into the ventilation system.
 (12) Q. Now would you look through those
 (13) pictures and tell me whether any of the pictures
 (14) depict the existence of the dust or other particle
 (15) matter that you found when you came to the facility
 (16) in September?
 (17) A. BMS 01236, this was the debris in the
 (18) office area.
 (19) Q. Now, this is, this photograph is
 (20) dated January 16, 2006?
 (21) A. That's correct.
 (22) Q. And I assume you are pointing out
 (23) some marks on the floor of the room there?
 (24) A. Um-hum.
 (25) Q. And is that what the dust and debris

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- (1) looked like?
 (2) A. Yes.
 (3) Q. Now, that's in the office area. What
 (4) office area is that in the facility?
 (5) A. It's considered the secretary area on
 (6) this blueprint. This is above BMS 01232, this is
 (7) debris above the animal room, 13.
 (8) Q. And that is also dated January 16,
 (9) 2006?
 (10) A. That's correct. BMS 01241, this is
 (11) debris catwalk above room 13.
 (12) Q. And you are referring to a legend in
 (13) the back of that photograph?
 (14) A. Yes. BMS 01243, this is typical of
 (15) the debris that was in the facility. That's my
 (16) foot. Grating above men's roof.
 (17) Q. Grating above men's room?
 (18) A. Yes.
 (19) Q. So does that have a separate ceiling?
 (20) A. Yes, it does.
 (21) Q. That was also taken on January 16,
 (22) 2006; is that correct?
 (23) A. Yes. BMS 01244, debris on top of air
 (24) handler No. 5.
 (25) Q. Where is that located?

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- (1) A. Interstitial space above the men's
 (2) room.
 (3) Q. That's between the drop ceiling and
 (4) roof deck?
 (5) A. The decking, yes. BMS 01245, this is
 (6) debris that came in above the boiler room.
 (7) Q. And the boiler room is located on the
 (8) same level as the rest of the facility?
 (9) A. Yes, the boiler room is ground level
 (10) and this is on top of it. BMS 01247, this is
 (11) debris in the northwest corner of the building.
 (12) That's outside.
 (13) Q. That's outside at ground level?
 (14) A. Yes. BMS 01246, this is dust and
 (15) debris above the water lines above the boiler room.
 (16) Q. So Mr. Post, you've been kind enough
 (17) to point out a number of the pictures that were
 (18) taken. They seem to have mostly been taken in
 (19) January of 2006, that you state accurately depicts
 (20) the type of dust and debris that infiltrated the
 (21) facility in Somerville?
 (22) A. That's correct.
 (23) Q. And the fact that that was still
 (24) there in January of 2006 would indicate that those
 (25) areas at least had not been cleaned yet by your

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- (1) cleaning crews?
 (2) A. That's correct.
 (3) MR. VINICOMBE: Objection to the form
 (4) of the question.
 (5) Q. You can answer.
 (6) MR. VINICOMBE: Go ahead.
 (7) A. That's correct.
 (8) Q. And do you know whether any of that
 (9) dust and debris was tested for the existence of
 (10) asbestos containing materials?
 (11) A. There were tests taken. I don't know
 (12) if that, you know, debris.
 (13) Q. You don't know?
 (14) A. I don't know.
 (15) Q. So when the cleaning crew came in and
 (16) started to clean up, how long did that take them to
 (17) clean the facility?
 (18) A. There was an initial cleaning.
 (19) Q. When did that take place?
 (20) A. Within weeks after the September
 (21) incident. Then we had to wear a full PPE the whole
 (22) time. Then contract was given to Bristol
 (23) Environmental to come in and physically clean the
 (24) facility after the new roof was installed.
 (25) Q. And that happened at some time in

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- (1) December 2005, isn't that correct?
- (2) **A. That's correct.**
- (3) **Q. Were you there on site supervising**
- (4) **the continuing clean-up?**
- (5) **A. Yes.**
- (6) **Q. And you continued to do that until**
- (7) **the clean-up was completed?**
- (8) **A. Yes.**
- (9) **Q. I believe you said that was**
- (10) **approximately February of 2006?**
- (11) **A. Yes.**
- (12) **Q. Now, as part of the clean-up, did you**
- (13) **do any construction at the property?**
- (14) **A. I -**
- (15) **Q. That may not be a fair question. You**
- (16) **know what? If you don't mind, after the clean-up**
- (17) **was completed in February 2006, did things return**
- (18) **to normal to your knowledge at the premises?**
- (19) **A. After the clean-up was finished, then**
- (20) **I had to go back and restore the facility, put it**
- (21) **back together.**
- (22) **Q. And what did that consist of?**
- (23) **A. Replacing ceilings, lighting,**
- (24) **ventilation.**
- (25) **Q. What happened to those components?**

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- (1) **A. Most of them were taken out and**
- (2) **thrown away during the clean-up.**
- (3) **Q. So the tiles that were removed from**
- (4) **the drop ceiling would be discarded?**
- (5) **A. Yes, because they were contaminated.**
- (6) **Q. Because they had dust on them?**
- (7) **A. Yes.**
- (8) **Q. And when you say lighting, the**
- (9) **lighting was actually taken out and discarded?**
- (10) **A. Umm, I would say, if we look at BMS**
- (11) **01233, this was the condition of the corridor**
- (12) **between the men's and ladies' room, and this is**
- (13) **what it looked like after it was cleaned.**
- (14) **Q. Did it look like that because the**
- (15) **drop ceiling had been removed?**
- (16) **A. Drop ceiling was removed. T wires**
- (17) **were removed.**
- (18) **Q. What was removed?**
- (19) **A. T wires. They hold up the tiles.**
- (20) **Q. Those grids that go up?**
- (21) **A. Grids, grids.**
- (22) **Q. Why were those removed, do you know?**
- (23) **A. They had to be removed to get the**
- (24) **lifts up to the decking for the Bristol**
- (25) **Environmental to clean from the decking on down.**

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- (1) **Q. So to get whatever they needed to be**
- (2) **boosted up to the decking, they had to take the**
- (3) **grids out?**
- (4) **A. That's correct.**
- (5) **Q. And so all the grids were removed**
- (6) **throughout the facility, is that fair to say?**
- (7) **A. Yes.**
- (8) **Q. All the ceiling tiles were removed**
- (9) **throughout the facility?**
- (10) **A. Yes.**
- (11) **Q. And how much of the lighting was**
- (12) **removed?**
- (13) **A. All of it.**
- (14) **Q. Every light fixture throughout the**
- (15) **facility was removed?**
- (16) **A. I'm sorry, they were not removed.**
- (17) **They were replaced. They were running on wires**
- (18) **during the cleaning process and some were damaged**
- (19) **during the cleaning process.**
- (20) **Q. By the cleaning crew?**
- (21) **A. By the cleaning crew.**
- (22) **Q. So are those the ones that were**
- (23) **replaced?**
- (24) **A. Yes.**
- (25) **Q. Were there other fixtures that**

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- (1) **remained and continue there?**
- (2) **A. Every fixture in the animal room 1**
- (3) **through 9 was taken down, reused and put back up.**
- (4) **Q. Was any work - strike that**
- (5) **How long did it take you, if you recall, to**
- (6) **rebuild or refit the facility?**
- (7) **A. Couple months. We had to**
- (8) **decontaminate, rebuild.**
- (9) **Q. Well, as far the decontamination**
- (10) **goes, I assume that when you testified that by**
- (11) **February it was certified asbestos free, that's the**
- (12) **decontamination, is that fair to say?**
- (13) **A. We did areas, because the facility**
- (14) **was a functioning facility, we did one area,**
- (15) **decontaminated it, rebuilt it and moved the animals**
- (16) **from one side of the facility to the clean side.**
- (17) **Then we went to the project of doing the second**
- (18) **phase of the animal rooms, cleaning them,**
- (19) **decontaminating them, rebuilding them. Then we**
- (20) **moved into the warehouse area, decontaminated that**
- (21) **and rebuilt what we needed to do. Same with the**
- (22) **office and bathrooms. They were decontaminated.**
- (23) **The ceilings come out. They were decontaminated,**
- (24) **new ceilings and lighting went back in and then**
- (25) **they could be occupied.**

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- (1) Q. So I can understand when you say
 (2) decontaminated, you mean clean up the dust?
 (3) A. Clean up the dust.
 (4) Q. And was that done by February of
 (5) 2006?
 (6) A. I would say March 2006 the dust was,
 (7) the decontamination was completed.
 (8) Q. And when was reconstruction
 (9) completed?
 (10) A. By March, about 50 percent of the
 (11) reconstruction was already done.
 (12) Q. Do you know whether the employees had
 (13) returned to the facility by then?
 (14) A. The employees continued to work
 (15) throughout the whole time.
 (16) Q. Wearing the Tyvek suits?
 (17) A. Yes, sir.
 (18) Q. And when you were doing some
 (19) rebuilding, the employees just moved to another
 (20) part of the facility, is that fair to say?
 (21) A. That's fair. That's correct.
 (22) Q. Do you know - strike that.
 (23) MR. MAHER: Could we mark this whole
 (24) book?
 (25) (Exhibit SF-1, binder, marked for

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- (1) (identification.)
 (2) Q. Mr. Post, I want to show you a binder
 (3) that has been marked SF-1. It's entitled
 (4) "Somerville Costs." I don't know if you've seen
 (5) this before. I'll represent to you that this was
 (6) provided to my client by representatives of
 (7) Bristol-Myers, and my understanding is that it sets
 (8) forth a substantial amount of the documentation
 (9) supporting the damage claim in this case, and I
 (10) just wanted to go through a few of these things
 (11) with you, and I don't know, the pages are not
 (12) really numbered consecutively, so I think we have
 (13) to blunder through, if you don't mind.
 (14) Were you responsible at all for the care,
 (15) custody and housing of the monkeys at the facility?
 (16) A. No.
 (17) Q. That was Mr. Deck?
 (18) A. Yes.
 (19) Q. About a third of the way through, and
 (20) again I apologize for the, any difficulty, but
 (21) there is a document that's entitled draft for
 (22) internal use only and it's followed by an invoice
 (23) from Ron Caruso Construction. This is what it
 (24) looks like. It seems to be a requisition for
 (25) \$1,680?

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- (1) A. Okay, I have it in front of me.
 (2) Q. Do you have that, Mr. Post?
 (3) A. I have it in front of me, yes.
 (4) Q. This seems to be some sort of an
 (5) internal document. Could you describe generally
 (6) what this document is?
 (7) A. This is a requisition that we put in
 (8) SAP.
 (9) Q. What is SAP?
 (10) A. It's a program that we use to keep
 (11) track of costs. I don't know what SAP means.
 (12) Q. But it's part of your computer
 (13) system?
 (14) A. It's our accounting system, yes.
 (15) Q. Now, who would generate a document
 (16) such as this?
 (17) A. I go out, I would go out to Ron
 (18) Caruso Construction and ask for a quote for some
 (19) work. He comes in, gives me a quote. I attach the
 (20) quote with an e-mail to the admin of our department
 (21) saying please create a service order or purchase
 (22) order for this amount. The admin would put it into
 (23) SAP and then when it's approved, this document is
 (24) generated with a P.O. number on it and that's how
 (25) the - Ron Caruso gets paid by this P.O. number

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- (1) after the work is completed.
 (2) Q. So this is in essence your purchase
 (3) order to Ron Caruso Construction for whatever work
 (4) he quoted to you?
 (5) A. Yes.
 (6) Q. And this seems to be followed up in
 (7) the book with a proposal from Ron Caruso
 (8) Construction for certain work?
 (9) A. Yes.
 (10) Q. And the proposal is for \$1,680; is
 (11) that correct?
 (12) A. That's correct.
 (13) Q. Now, did you deal directly with Ron
 (14) Caruso Construction company?
 (15) A. Yes, I did.
 (16) Q. And who were they?
 (17) A. They are a construction company
 (18) that's an approved BMS vendor.
 (19) Q. They are an approved Bristol-Myers
 (20) vendor?
 (21) A. BMS vendor.
 (22) Q. So you went out to them and
 (23) contracted with them to do certain work at the
 (24) Somerville facility, is that fair to say?
 (25) A. Yes.

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- (1) Q. And these are invoices, purchase
 (2) orders for certain of that work. This one seems to
 (3) refer to paint dry walls in offices and bathrooms?
 (4) A. That's correct.
 (5) Q. Continuing in the binder, there's
 (6) another one of the draft requisition forms and has
 (7) to do with Turtle & Hughes for \$4,309.79. Is that
 (8) correct?
 (9) A. Yes, it is.
 (10) Q. Were you responsible for contracting
 (11) with Turtle & Hughes?
 (12) A. Yes, I was.
 (13) Q. What did they provide?
 (14) A. Replacement ceiling tiles for the
 (15) facility.
 (16) Q. So is it fair to say that as we go
 (17) through this and documents that were provided
 (18) consist of a proposal or some sort of a quote from
 (19) a contractor and then one of those internal
 (20) requisition documents, that these are things that
 (21) you would have negotiated for the construction of
 (22) the facility?
 (23) A. Yes.
 (24) Q. Two or three documents further down
 (25) there's one of these requisitions for Wackenhut

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- (1) Security Systems. Would you have been involved
 (2) with Wackenhut Security Systems, you personally?
 (3) A. Yes.
 (4) Q. And this is a purchase order for
 (5) \$2,179, and I believe that it is followed up by an
 (6) e-mail from you regarding certain expenses at
 (7) Wackenhut. Can you describe those for me?
 (8) A. The facility has 24/7 security. They
 (9) are in the front office where they have their
 (10) monitoring station.
 (11) Q. So they are inside the building?
 (12) A. Inside the building 24/7. They were
 (13) not allowed in the building during the clean-up, so
 (14) I had to get them a security vehicle so they could
 (15) set out front of the facility.
 (16) Q. What kind of vehicle, a trailer?
 (17) A. No, it was a Jeep or something like
 (18) that.
 (19) Q. A rental car?
 (20) A. SUV.
 (21) Q. A rental car?
 (22) A. Yes.
 (23) Q. And so this is an expense for renting
 (24) the SUV that sat in the parking lot?
 (25) A. Yes, with the security officer in it.

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- (1) Q. And there's also some sort of a cell
 (2) phone expense included in there. Do you see that?
 (3) A. Yes, I do. They had a cell phone
 (4) because they could not access the building's phone
 (5) service. They couldn't go in the building.
 (6) Q. The next requisition seems to be
 (7) regarding waste management Inc. and -- strike that.
 (8) About two pages further along there's a
 (9) requisition for Ron Caruso Construction?
 (10) MR. VINICOMBE: Excuse me, I'm sorry.
 (11) (Discussion off the record.)
 (12) Q. I'm referring you to a requisition
 (13) for Ron Caruso Construction Company for \$10,900
 (14) which is, I'm not sure if it's supported by an
 (15) invoice, but the requisition refers to supply and
 (16) install a new ceiling grid. Is that what you
 (17) described before that the grid had to come down so
 (18) that the cleaning people's lifts could go up?
 (19) A. Yes.
 (20) Q. And then Ron Caruso's construction
 (21) company came in and replaced that grid?
 (22) A. That's correct.
 (23) Q. There's a requisition that again is
 (24) just a page or two further along to General Air
 (25) Systems, Inc. Are you familiar with that?

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- (1) A. Yes, I am.
 (2) Q. And it seems to refer to a set of
 (3) supply air filters. Were those filters for the
 (4) facility?
 (5) A. Yes, they were.
 (6) Q. Now, are those filters that you have
 (7) available and use as part of your regular
 (8) maintenance?
 (9) A. No. I had to purchase those filters
 (10) because the ones that were in the air handlers were
 (11) contaminated with dust from the roofing project.
 (12) Q. Well, as a matter of regular
 (13) maintenance, do you ever replace the filters in the
 (14) air handlers?
 (15) A. Yes, on a twice a year basis.
 (16) Q. Do you have those in stock or do you
 (17) go out and buy them each time?
 (18) A. No, I go out and buy them because
 (19) there's no storage in the facility.
 (20) Q. Do you have any idea when the last
 (21) time the air handlers and filters were changed?
 (22) A. I do not.
 (23) Q. Let me retrace that. Do you have any
 (24) idea when was the last time prior to this invoice
 (25) that the filters and the air handlers were changed?

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- (1) A. That information's available, but I
 (2) do not have it with me.
 (3) Q. Then about four or five pages further
 (4) along there is another requisition for Ron Caruso
 (5) Construction Company and the total amount of
 (6) \$31,150, and I'm not sure exactly what it refers
 (7) to. Do you know what work he did for that payment?
 (8) A. He put up - he worked in the lobby
 (9) area, maintenance office, lunchroom, room 51,
 (10) electrical closet. He removed existing grid and
 (11) replaced aluminum cap grid, replaced ceiling tiles
 (12) in animal rooms, caulked tile to grid to wall and
 (13) had an electrician for five days to re-hang the
 (14) lights.
 (15) Q. Now, this is in addition to whatever
 (16) he billed you before to replace the grid?
 (17) A. I had stated this was done in three
 (18) phases, so that's why there's different bills in
 (19) different areas.
 (20) Q. Two or three pages further along is a
 (21) requisition for Bristol Environmental and the total
 (22) sum of \$283,000. Would you have been involved in
 (23) approving that payment?
 (24) A. No.
 (25) Q. Who would have been? Would that be

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- (1) Barbara Owen?
 (2) A. The GOA approver on this certificate
 (3) is Anton Lemli.
 (4) Q. Who is he?
 (5) A. He's a director over in
 (6) Lawrenceville.
 (7) Q. A director of what?
 (8) A. Director of facilities.
 (9) Q. How would he have been involved?
 (10) A. As the dollar amounts on requisitions
 (11) change, your granting power also changes.
 (12) Q. So you have a certain authority to
 (13) approve requisitions?
 (14) A. Yes.
 (15) Q. Anton Lemli has more authority than
 (16) you, is that fair to say?
 (17) A. Yes.
 (18) Q. This was referred to him for his
 (19) approval?
 (20) A. Yes.
 (21) Q. Who's Kathryn O'Connor?
 (22) A. Our department admin, secretary,
 (23) admin, whatever.
 (24) Q. In your facilities department?
 (25) A. In facilities in Plainsboro.

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- (1) Q. Now, behind that requisition it
 (2) appears that there's a proposal from Bristol
 (3) Environmental addressed to Mr. Robert Pappa, and I
 (4) probably asked you that before, who is Mr. Pappa at
 (5) Bristol-Myers?
 (6) A. He's the facilities manager for
 (7) Plainsboro, and he is my manager.
 (8) Q. And is there any reason that this
 (9) would have been addressed to him?
 (10) A. At the time I believe he got involved
 (11) in the clean-up because he wanted to know the
 (12) dollars, prices of clean up.
 (13) Q. So would Mr. Pappa have been the one
 (14) involved in negotiating this proposal with Bristol
 (15) Environmental?
 (16) A. No.
 (17) Q. Who would have been there?
 (18) A. I did the walk-through with Bristol
 (19) Environmental at the Somerville facility.
 (20) Q. So this proposal which is addressed
 (21) to Mr. Pappa is dated December 23. Does this
 (22) result from the walk-through that you did with
 (23) Bristol Environmental?
 (24) A. Yes.
 (25) Q. As you walked through, did they point

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- (1) out things to you that had to be done?
 (2) A. They took notes. They didn't make
 (3) any suggestions at the time. They just took notes
 (4) and the extent of the clean-up.
 (5) Q. Did you point out things to them as
 (6) you walked through?
 (7) A. They went everywhere in the facility
 (8) and looked for themselves.
 (9) Q. Now, on the second page of that
 (10) proposal in the third paragraph it references
 (11) ceiling tiles and grid. It says all areas that
 (12) ceiling tile exists will be removed and properly
 (13) disposed. All grid will be removed and properly
 (14) disposed. Note the perimeter tract will remain for
 (15) BMS to reinstall ceiling tile.
 (16) Is that what you described previously as far
 (17) as the tiles and the grids having to be replaced?
 (18) A. That's correct.
 (19) Q. And that replacement was not within
 (20) the proposal from Bristol Environmental, is that
 (21) true?
 (22) A. That's correct. They did not replace
 (23) any ceiling tiles or grid.
 (24) Q. Now, is Bristol Environmental
 (25) affiliated in any way with Bristol-Myers, do you

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- (1) know?
- (2) A. No.
- (3) Q. No, you don't know, or no, they are
- (4) not?
- (5) A. They are not.
- (6) Q. And do you know whether you sought
- (7) any other estimates or proposals for this work?
- (8) A. They were recommended by
- (9) Environmental Health and Safety Department. They
- (10) had done work at the Lawrenceville facility. They
- (11) were an approved contractor and this was considered
- (12) an emergency, so...
- (13) Q. Well, by December - strike that.
- (14) So the answer is you did not seek any other
- (15) estimates or proposals from other contractors?
- (16) A. I did not.
- (17) Q. Further along in the book there is a
- (18) requisition that is issued to Blasland, Bouck & Lee
- (19) in Syracuse, New York. Did you find that?
- (20) A. Yes, I did.
- (21) Q. Do you have any idea who Blasland,
- (22) Bouck & Lee are?
- (23) A. No. I've only heard the initials
- (24) BB&L.
- (25) Q. Did you contract with them at all?

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- (1) A. No, I did not.
- (2) Q. And did you approve this requisition
- (3) in any way?
- (4) A. No, I did not.
- (5) Q. When the work was done to restore and
- (6) repair the facility, was any additional work done
- (7) beyond what was necessary to just put the facility
- (8) back in the condition it was in prior to the roof
- (9) incident?
- (10) A. No.
- (11) Q. Is -
- (12) A. I replaced in kind everything that we
- (13) took out. I just put the same thing back. It was
- (14) much easier to negotiate service, you know,
- (15) contracts with the vendors and everything else. I
- (16) bought the tiles, all the ceiling tiles from our
- (17) approved vendor.
- (18) Q. That's Turtle & Hughes?
- (19) A. Turtle & Hughes which saved us money
- (20) in that aspect and only had Ron Caruso put up the
- (21) grids. We put the tiles in. That's kind of how
- (22) the project went.
- (23) Q. Did you put in any new HVAC at all?
- (24) A. No.
- (25) Q. Did you put in any new electrical or

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- (1) plumbing?
- (2) A. The light, if you want to say
- (3) electrical, we - the old T-12, two by four hanging
- (4) fixtures were taken out and new T-8 fixtures were
- (5) put in. It was a cost savings in buying the new
- (6) T-8s than retrofitting the old T-12s.
- (7) Q. Did you reconfigure any of the rooms
- (8) or offices?
- (9) A. No.
- (10) Q. Knock down any walls or replace them?
- (11) A. No.
- (12) Q. Were you involved at all in approving
- (13) or supervising the work that Slavco Construction
- (14) did to replace the remainder of the roof in
- (15) December 2005?
- (16) A. I was there Friday afternoon when
- (17) Slavco showed up. They had agreed to do the work
- (18) over the weekend when the employees were not there.
- (19) It was late in the evening. It was very cold.
- (20) They started on the roof and I was concerned about
- (21) what they were doing. The one that - the water
- (22) they were using to try to keep down the dust was
- (23) freezing, and I expected the Somerville Police
- (24) Department to show up because somebody was working
- (25) on the roof in the middle of the night. That was

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- (1) my concerns.
- (2) Q. Did you stay there while they were
- (3) there?
- (4) A. No, I left.
- (5) Q. Do you know whether the police ever
- (6) showed up?
- (7) A. I didn't get that call.
- (8) Q. Slavco eventually finished their work
- (9) and the roof was completed in December of 2005,
- (10) isn't that true?
- (11) A. That's correct.
- (12) Q. Do you know whether Bristol-Myers had
- (13) any problems or complaints about the finished
- (14) product that was completed in 2005 - in December?
- (15) A. No, I'm very happy with the roofing
- (16) project - the product, put it that way. There are
- (17) no leaks. It looks nice.
- (18) MR. MAHER: I have no further
- (19) questions. Thank you very much, Mr. Post.
- (20) MR. VINICOMBE: Before we go off the
- (21) record, I had mentioned earlier, Larry, that when
- (22) Bob showed up this morning he had found a binder
- (23) containing invoices which as I understand it and
- (24) perhaps Bob can identify is duplicative of what's
- (25) been produced. There may be some additional

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- (1) invoices in here marked Somerville service tickets,
- (2) quotes and packing slips. I have one copy for you
- (3) that has no Bates stamps on it. We'll produce
- (4) another copy with the Bates numbers, so it will be
- (5) easier to refer to in the future if there's any
- (6) need for it. I wanted to make that available to
- (7) you.
- (8) MR. MAHER: Maybe we can go back on
- (9) the record.
- (10) CONTINUED DIRECT EXAMINATION BY MR. MAHER:
- (11) Q. Mr. Post, this binder that counsel
- (12) just delivered to me consists of documents that
- (13) you've located since the document production. Is
- (14) that accurate?
- (15) A. Yes, it is.
- (16) Q. And would it be fair to say that
- (17) you're presenting these documents as further backup
- (18) to the costs that are being claimed in this
- (19) arbitration?
- (20) A. Some of those documents are the cost
- (21) of the clean-up at Somerville and others are just
- (22) documents of work that we did at the facility. I
- (23) just gathered them and I did not have time to sort
- (24) through them or confirm what was in there. There's
- (25) also duplicates from what you showed me.

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- (1) Q. Is there some sort of a facilities
- (2) file that you maintained for all work done in
- (3) Somerville?
- (4) A. We have a Maximo system, so if there
- (5) is any preventative maintenance, work order goes
- (6) out and the mechanic performs the work and it's
- (7) signed off on. Preventative maintenance also of
- (8) the air handlers and filter changes and it's stuff
- (9) like that. If something breaks, then I'm
- (10) responsible for getting a contractor in to get it
- (11) repaired.
- (12) Q. These documents that were just
- (13) produced, where would the hard copies of these
- (14) documents be maintained at your office?
- (15) A. On my desk. That's exactly where it
- (16) was.
- (17) Q. As a result of this case or just in
- (18) general?
- (19) A. Just in general. This was documents
- (20) that I collected at the site as things were coming
- (21) in and as people were handing me papers. Only so
- (22) that I would have a record if somebody ever come
- (23) back and ask me what was put in, you know, what
- (24) came into the facility. Was it delivered to the
- (25) facility, you know. It was - it's not a complete

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- (1) record, but what was given to me on a daily basis I
- (2) saved.
- (3) Q. And maintained in your desk file?
- (4) A. I maintained it in Plainsboro.
- (5) MR. MAHER: Thank you very much.
- (6) (Time noted at 11:30 a.m.)
- (7)
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- (1) CERTIFICATE
- (2)
- (3) I, Donna Brunck, a Notary Public, Certified
- (4) Shorthand Reporter, of the State of New Jersey,
- (5) Certificate No. XI01487, do hereby certify prior to
- (6) the commencement of the examination, ROBERT POST
- (7) was sworn by me to testify the truth, the whole
- (8) truth and nothing but the truth.
- (9) I DO FURTHER CERTIFY that the foregoing is a
- (10) true and accurate transcript of the testimony as
- (11) taken stenographically by and before me at the
- (12) time, place and on the date hereinbefore set forth.
- (13) I DO FURTHER CERTIFY that I am neither a
- (14) relative nor employee nor attorney nor counsel of
- (15) any of the parties to this action, and that I am
- (16) neither a relative nor employee of such attorney or
- (17) counsel, and that I am not financially interested
- (18) in this action.
- (19) I DO FURTHER CERTIFY that the within
- (20) transcript format complies with Rule NJ ADC
- (21) 13:43-5.9.
- (22)
- (23)
- (24) Donna Brunck, CSR
- (25) License No. XI01487

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BSA

Bristol vs. Somerville: Dep. of Robert Post: 1-26-07

Look-See(17)

**Look-See
Concordance Report**

UNIQUE WORDS: 990
TOTAL OCCURRENCES:
2,740
NOISE WORDS: 384
TOTAL WORDS IN FILE:
9,270

SINGLE FILE
CONCORDANCE

CASE SENSITIVE

COVER PAGES = 2

INCLUDES ALL TEXT
OCCURRENCES

DATES ON

IGNORES PURE
NUMBERS

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ON

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EXHIBIT 11



Environmental Health Investigations, Inc.

655 West Shore Trail
Sparta, New Jersey 07871.

Phone/Fax: 973-729-5649

www.ehi-inc.com

March 19, 2007

Mr. Lawrence P. Maher
Greenbaum, Rowe, Smith & Davis LLP
Metro Corporate Campus One
PO Box 5600
Woodbridge, NJ 07095

Lmaher@greenbaumlaw.com

Re: Summary of Oral Report - William S. Kerbel, CIH

Dear Mr. Maher:

I am adopting the attached oral report subject to the following clarification.

Roof material is classified by the US EPA as a Category One non friable asbestos containing material.

Please let me know if you have any questions.

Very truly yours,

William S. Kerbel, CIH
President

cover2007.GreenbaumRoweSmithDavis

SUMMARY OF ORAL REPORT FROM WILLIAM S. KERBEL, CIH

I am a certified industrial hygienist and the President of Environmental Health Investigations, Inc. in Sparta, New Jersey. We were retained by Somerville Fidelco to provide consultation and monitoring of the roof removal operations conducted at 76 Fourth Street, Somerville, New Jersey in December 2005. We also participated in establishing procedures and protocols for the December 2005 roof removal. During the roof removal we observed the work of Slavco Construction and conducted air quality tests in the roof area. We were aware of the protective measures employed by Tuff Wrap on the interior of the facility. In addition, I have reviewed the following materials:

1. Correspondence dated February 9, 2007 from counsel for Bristol Myers attaching test results from September 22, 2005 on samples collected by Blasland, Bouck & Lee.
2. Letters from Eagle Industrial Hygiene Associates dated September 29, 2005, November 15, 2005, January 26, 2006 and April 10, 2006 which summarize the results of their various tests at the facility.
3. Proposal letter dated December 23, 2005 from Bristol Environmental which sets forth the services to be rendered and costs to be charged for cleanup of the facility.
4. Transcript of Deposition of Pat Bortner, Bristol Environmental Supervisor.
5. Transcript of Deposition of David Burkhardt, Eagle Industrial Hygiene.

Asbestos containing roof material is unique. It is classified as a Category I Hazardous Material. It typically consists of a number of layers of different materials in addition to any asbestos, and is bound together by asphalt. As a result, asbestos containing roof material is not hazardous in its bulk form. Unless the roof material is pulverized and asbestos fibers are released there is no danger.

Bulk samples of roof material at the Somerville facility were gathered in September 2005 from a limited area of the interior of the facility. The bulk samples tested positive for a percentage of asbestos. It appears that a preliminary cleanup of these areas was conducted in October 2005. The remainder of the cleanup did not take place until after the "second phase" of the roof removal and replacement in December 2005. It is evident from the proposal letter dated December 23, 2005 from Bristol Environmental and the deposition of Pat Bortner that the cleanup of the remaining dust and debris at the facility was performed by asbestos abatement professionals with all requisite protection and precautions. However, it is my opinion that there was no evidence that the material which was being cleaned up contained asbestos, and no reason to utilize licensed asbestos workers.

Every test performed by Eagle Environmental after September 2005 was negative for asbestos. Vacuum samples of the dust throughout the facility were negative and recurring air

quality samples during the cleanup were also negative. There is no scientific basis to believe that the dust which was vacuumed and wiped down throughout the facility contained asbestos. There are many reasons to believe that it did not.

- The "first phase" roof removal by Badger Roofing did not involve the entire roof. Therefore, it is unlikely that the entire facility would have dust and debris from the first stage roof removal.
- The "second stage" roof removal in December 2005 utilized extraordinary asbestos abatement procedures which would have prevented any asbestos containing roof materials from entering the facility.
- The facility was wrapped in six-mil plastic sheeting during the second stage of roof removal.

It is my opinion, based on the procedures and precautions employed during the second stage of the roof removal, that any dust and debris which had to be cleaned up in the entire facility would not have contained asbestos. It is possible that the dust came from the new roof which was installed after the old roof was replaced. The new roof material does not contain asbestos.

Based on the materials I reviewed it is evident that Bristol-Myers utilized an abundance of caution throughout this event and cleaned up the facility using licensed asbestos abatement personnel. However, since there is no evidence that any of the dust and debris which was cleaned up at the facility after December 2005 contained asbestos, it is my opinion that the cleanup could have been performed using unlicensed labor at a substantial lesser cost.

EXHIBIT 12

GREENBAUM, ROWE, SMITH & DAVIS LLP

COUNSELORS AT LAW

METRO CORPORATE CAMPUS ONE
P.O. BOX 5600
WOODBIDGE, N. J. 07095-0988
(732) 549-5600
FAX (732) 549-1881

DELIVERY ADDRESS:

99 WOOD AVE. SOUTH
ISELIN, NEW JERSEY 08830-2712

75 LIVINGSTON AVENUE
ROSELAND, NEW JERSEY 07068-3701
(973) 535-1600
FAX (973) 535-1698

EMAIL: INFO@GREENBAUMLAW.COM

WWW.GREENBAUMLAW.COM

PAUL A. ROWE
WENDELL A. SMITH
ALAN E. DAVIS
DAVID L. BRUCK
MICHAEL A. BACKER
MARTIN E. DOLLINGER
DEAN A. GAYER
ROBERT C. SCHACHTER
MARTIN L. LEPELSTAT
DENNIS A. ESTIS
WILLIAM D. GRAND
RAYMOND M. BROWN
ALAN S. NAAR
STEPHEN H. KNEE
ROBERT M. GOODMAN
DOUGLAS K. WOLFSON
MARK H. SOBEL
HAL W. MANDEL
BARRY S. GOODMAN
LAWRENCE P. MAHER
THOMAS J. DENITZIO, JR.
ROBERT S. GOLDSMITH
JOHN D. NORTH
KENNETH T. BILLS
THOMAS C. SENTER
MARGARET GOODZEIT
W. RAYMOND FELTON
CHRISTINE F. LI
MERYL A.G. GONCHAR

WM. L. GREENBAUM (1914-1983)
ALLEN RAVIN (1957-1997)

MICHAEL K. FEINBERG
CARLTON T. SPILLER
JOSEPH M. ORIOLO
ARON M. SCHWARTZ
SABRINA A. KOGL
JACQUELINE M. PRINTZ
STEVEN C. DELINKO
DAVID A. ROTH
GARY K. WOLINETZ
KEVIN T. MCNAMARA
RICHARD L. HERTZBERG
ELLEN A. SILVER
ANDREA J. SULLIVAN
MARC D. POLICASTRO
MARC J. GROSS
LUKE J. KEALY
C. BRIAN KORNBERG
CIPORA S. WINTERS
GALIT KIERKUT
BRIAN R. SELVIN
PETER D. CRAWFORD, JR.
EMILY A. KALLER
ARREN S. GOLDMAN
DARREN C. BARREIRO
OLIVIER SALVAGNO
STEVEN NUDELMAN
DINA M. VANIDES
HANY A. MAWLA

OF COUNSEL

ROBERT S. GREENBAUM ARTHUR M. GREENBAUM
FRANKLIN M. SACHS
J. WARREN WOOD III

COUNSEL

CHRISTINE F. MARKS HOWARD B. HANDER
ROBERT S. UNDERHILL LORA L. FONG
STEVEN FIRKSER JODI L. ROSENBERG
ALLEN V. BROWN MICHELE GIBSON

ROSEMARY CULCASI JEFFREY A. SIROT
ERIC H. MELZER MICHAEL A. GOROKHOVICH
MARINA SOLO LISA J. CLAPP
ROBERT BECKELMAN GREGG H. HILZER
MAJA M. OBRADOVIC LISA B. DIPASQUA
JANE J. FELTON MEGHAN O. MURRAY
STACEY R. COHEN ERNEST E. D'ANGELO
MICHAEL A. KLEIN JORDAN A. STERN
DEAN E. LOVENTHAL CATHERINE Y. BANKER
SENWAN AKHTAR LAURA M. BILOTTA
BRYAN D. FLOCKER JAMIE A. YONKS
DAVID T. SHIVAS JEANETTE TANNER
DAVID S. SCHECHTER MICHAEL G. D'ALBA
ADAM B. KAPLAN BLAKELY D. FISHLIN
JESSICA F. BATTAGLIA KATIE M. HOLDEN
JEMI M. GOULIAN JULIE KUSHNER
JOHN B. NANCE CHRISTOPHER J. LEDOUX
MICHELLE M. SEKOWSKI CATHERINE S. SHIMSKY

REPLY TO: Woodbridge

March 30, 2007

VIA FACSIMILE 212-754-0330

AND REGULAR MAIL

David M. Rubin, Esq.
Golenbach Eiseman Assor Bell & Peskoe LLP
437 Madison Avenue
New York, NY 10022

Re: 18 115 Y 01071 06
Bristol-Myers Squibb Company v. Somerville Fidelco Associates, L.P.

Dear Mr. Rubin:

We represent the Respondent, Somerville Fidelco Associates, L.P. in the above referenced matter which is scheduled for an Arbitration Hearing which will commence before you on April 17, 2007. Pursuant to the Scheduling Order in this matter, we are submitting this Letter-Brief to summarize some of the issues to be determined in the Arbitration. It is not our intention to provide a comprehensive recitation of the case which will be presented on behalf of our client at the Hearing.

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This matter arises out of a commercial landlord-tenant relationship between the Respondent, as Landlord and Bristol-Myers Squibb ("BMS"), as the sole tenant in a building located at 76 Fourth Street, Somerville, New Jersey. The tenant utilized the facility to house monkeys until they were transported to other BMS locations to be used in pharmaceutical testing.

In September 2005 Badger Roofing, an independent contractor retained by the Landlord to replace the roof on the leased premises started work which caused some dust and debris to enter a portion of the building. Employees of BMS stopped the roof work on September 22, 2005. BMS arranged for samples of the material from one corner of the building to be tested, and informed the Landlord that some of the samples contained asbestos. In response to the tenant's concerns, the Landlord engaged a new contractor, Slavco Construction, Inc., to complete the roof removal using state-of-the-art methods and precautions which were approved by BMS. The methods and precautions included asbestos abatement measures, air monitoring and plastic sheathing on the interior of the facility. The remainder of the roof was removed and replaced between December 16 and December 19, 2005.

Thereafter, BMS embarked on a massive cleanup and reconstruction of the premises which lasted through April 2006. The cleanup was performed by licensed asbestos workers, using asbestos abatement protocols, and included the removal, disposal and reconstruction of interior ceilings and other significant tenant fit-up, at a substantial expense. BMS never asked

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the Landlord to perform any of this cleanup, and never submitted any of the proposed cleanup procedures or cost estimates to Landlord before the work was completed.

All tests performed after September 2005 on samples of the dust and debris which entered the building were negative for asbestos. All air sampling tests conducted in the interior and exterior of the building failed to detect asbestos fibers in the air in concentrations above permissible exposure limits at any time.

DAMAGES

The actions of BMS in this case were not reasonable or justified, and the extraordinary expenses incurred should not be the responsibility of the Landlord. BMS incurred all of the expenses and performed all of the work at the premises without offering the Landlord an opportunity to mitigate any alleged damages. The Landlord has defenses and offset under the terms of the Lease between the parties.

1. Cleanup. BMS must prove that it was necessary and reasonable to incur more than \$300,000 in expenses to cleanup dust which allegedly infiltrated the leased premises as a result of the two-stage roof removal and replacement activity in 2005, despite the fact that every test of the dust and the air throughout the facility after September 2005 failed to detect the presence of asbestos. Even the September tests which were performed on samples from a limited area of the premises failed to indicate wide-spread presence of asbestos.

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2. Reconstruction. BMS must prove that it was necessary and reasonable to pay more than \$60,000 for construction work on the tenant fit-up during the cleanup of the premises in 2006, and that such reconstruction should be the responsibility of the Landlord.

3. Monkey Boarding. BMS is claiming approximately \$225,000 in damages to "board" monkeys during the roof replacement and cleanup period at the premises. BMS must prove that these significant damages were necessary and reasonable, and could not have been mitigated.

4. Rent Abatement. BMS is seeking a partial rent abatement at the leased premises during the roof replacement and "cleanup period". BMS will not be able to prove that the premises were untenable at any time. Moreover, to the extent that BMS is seeking to recover all of its out-of-pocket costs, including monkey boarding costs, protective equipment and consumables, alternative security arrangements and the like, a rent abatement would be duplicative of these claims.

LEASE DEFENSES

There are provisions in the original Lease dated October 23, 1987 between the Landlord and BMS which provide defenses and setoffs to the claims of BMS.

1. Setoff For Roof Replacement. Section 5.1 of the Lease makes the Landlord responsible for "...necessary structural repairs to the roof and walls of the building...". It is

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evident from this language that the parties were making a distinction involving the structural component of the roof as opposed to replacement of the membrane, insulation and other covering materials. Otherwise, the word "structural" is unnecessary in the sentence. Various cases and authorities have addressed the distinction between a landlord's responsibility for structural components, and a tenant's responsibility for the remainder of the premises. There are judicial decisions on both sides of this issue, and BMS has submitted an Expert Report. Nevertheless, as indicated in the case of Southeast Banks Trust Company, N.A. v. Higginbotham Chevrolet-Oldsmobile, Inc. 445 So. 2d 347 (Fla. 1984), the clear and unambiguous statement of the parties in the lease must be followed without reference to any parol evidence of the parties' intentions.

There is no evidence that the structural components of the roof were damaged or required repair. Landlord has expended \$136,040 in removing and replacing the membrane and covering of the roof. This expense is the responsibility of BMS under the clear language of the Lease, and Landlord is entitled to a setoff in this amount against any damages awarded to BMS in this proceeding.

2. Exculpation and Limitation of Damages. Section 11.4 of the Lease limits the Landlord's liability for damages caused by Landlord or its contractors for property damage, and exculpates Landlord for "...inconvenience, annoyance, disturbance, loss of business...". Therefore, most of the claims of BMS have been contractually waived in the Lease.

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CONCLUSION

The Landlord had meritorious defenses and a valid setoff against the damages which have been claimed by BMS in this Arbitration Proceeding.

Respectfully submitted,

Greenbaum, Rowe, Smith & Davis LLP
Counsel for Respondent, Somerville Fidelco
Associates, L.P.

By: 
Lawrence P. Maher

LPM:gav

cc: Charles J. Vinicombe, Esq.- via fax 609-799-7000 and reg. mail
Patricia M. Fisk - via fax only 401-435-6529

EXHIBIT 13



Charles J. Vinicombe
609-716-6562
charles.vinicombe@dbr.com

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Via Federal Express

David M. Rubin, Esq.
Golenbach Eiseman Assor Bell & Peskoe LLP
437 Madison Ave.
New York, NY 10022

Re: 18 459 01071 06

Bristol-Myers Squibb Company v. Somerville Fidelco Associates, L.P.

Dear Mr. Rubin:

Our law firm represents Claimant Bristol-Myers Squibb Company ("BMS") in the above-referenced arbitration. This matter is scheduled for an arbitration hearing during the month of April. Please accept this letter as BMS's pre-hearing submission and brief.

The subject matter of this arbitration is an asbestos incident that occurred at 76 Fourth Street in Somerville, New Jersey (the "Somerville Facility"). The Somerville Facility is a 16,000 square foot building owned by Respondent Somerville Fidelco Associates, L.P. ("Somerville Fidelco"). BMS has been a tenant at the facility since 1987. (See Stipulation of Facts, ¶2). The facility is used by BMS to house and quarantine monkeys that are used in pharmaceutical drug testing. (See Stipulation of Facts, ¶6).

On October 23, 1987, BMS, as tenant, entered into a Lease with Somerville Fidelco, as landlord, for the Somerville Facility (the "Lease"). (See Stipulation of Facts, ¶3). The Lease had an original three-year term and subsequently was extended through a number of Lease Extension Agreements. (See Stipulation of Facts, ¶4). The current lease extension (the November 25, 2002 Lease Extension No. 2) is due to expire on October 31, 2008. (See Stipulation of Facts, ¶5). The Lease is attached at Tab A.

Factual Background

By way of background, on July 15, 2005, Somerville Fidelco hired a roofing contractor, Badger Roofing Company, Inc. ("Badger"), to remove and replace the roof at the Somerville Facility. (See Stipulation of Facts, ¶10). The roof had a history of leaks going back to at least 1996. (See Stipulation of Facts, ¶7). At the time that Badger was retained, the roof had reached the end of its life expectancy and was in a highly deteriorated condition. The roof leaks were so extensive that they created a safety hazard, with water leaking down the interior walls over electrical and environmental controls inside the facility.

Law Offices

105 College Road East
P.O. Box 627
Princeton, NJ
08542-0627
609-716-6500 phone
609-799-7000 fax
www.drinkerbiddle.com

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Liability Partnership*

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*Jonathan I. Epstein,
Partner responsible for
Princeton Office*

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David M. Rubin, Esq.

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Badger provided its roof removal services for Somerville Fidelco starting in September of 2005. (See Stipulation of Facts, ¶12). Approximately four months before Badger began its work, Somerville Fidelco had hired a roofing consultant, Harry H. Leavy, Inc. ("HHL"). On May 25, 2005, HHL sent a written Report to Somerville Fidelco's representative, Barry Ages. The Report, entitled "Presentation of Visual Roof Survey," documents the deteriorated condition of the roof. In the Report, HHL states that the purpose of the survey was to "identify and evaluate the present condition of the smooth surfaces built-up roof system on the building" and that the "Roof Survey Report does not include . . . Testing for Asbestos Containing Roof Materials (ACRM)." On page 3, under "Roof Data," HHL states that the "Insulation" was "Unknown. (*Suggest core samples be taken*)."

 (See Stipulation of Facts, ¶14) (Emphasis added).

Despite its roofing consultant's recommendation that core samples be taken to determine the composition of the roof and whether asbestos containing materials ("ACM") were present, Somerville Fidelco never arranged for core samples to be taken. (See Stipulation of Facts, ¶15). Somerville Fidelco did not provide the HHL Report to Badger and did not inform Badger that Somerville Fidelco had received a report from HHL suggesting that core samples be taken of the roof. (See Stipulation of Facts, ¶¶16, 17). As confirmed by Barry Ages and Badger's representative, Scott Badger, in their depositions, Somerville Fidelco also did not inform Badger that core samples had not been taken and that no determination had been made whether the roof contained asbestos materials. Badger also did not inquire of Somerville Fidelco whether core samples had been taken or whether the roof contained ACM. (See Stipulation of Facts, ¶15).

In his deposition, Mr. Badger testified that Badger is not a qualified asbestos removal contractor and that had Badger known that asbestos was present in the roofing materials at the Somerville Facility, Badger would have proceeded differently—Badger would have either subcontracted the roof removal phase of the project to a qualified asbestos contractor or it would have retained an expert to develop a protocol that Badger could have used to implement appropriate removal measures. (See Scott Badger Dep.—annexed at Tab B—at pages 9, 47-51, 65-67). Instead, Badger proceeded with its roof removal work as if ACM was not present.

As a result of Badger's roof removal activities, dust and debris containing asbestos materials infiltrated the Somerville Facility through gaps in the roof decking. When clouds of dust entered the facility, BMS immediately insisted that Badger cease its activities. BMS thereafter arranged for two environmental testing firms, Blasland, Bouck & Lee, Inc. ("BB&L") and Eagle Industrial Hygiene Associates, Inc. ("Eagle"), to conduct sampling and testing on the materials that infiltrated the facility. (See Stipulation of Facts, ¶25). Wipe samples of dust and bulk samples of debris that had entered the

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facility and core samples taken from the roof confirmed the presence of asbestos at regulated levels—more than 1%. (See Stipulation of Facts, ¶25).

The asbestos infiltration at the Somerville Facility adversely affected BMS in a number of respects. First and foremost, BMS was concerned about human exposure to asbestos dust and fibers. Seven BMS employees—and a number of third parties—were present in the facility at the time of the roofing job. BMS addressed this situation by sending letters to contractors and other third parties that were present at the facility notifying them of their potential exposure to asbestos. BMS also sent its employees to BMS's medical offices for information concerning their potential exposure. Those employees currently are participating in a medical monitoring program that BMS is funding. The New Jersey Department of Labor ("DOL") also became involved, with a DOL representative visiting the site and requesting information (including sampling results) from BMS to satisfy the DOL's concerns that the asbestos incident was being handled appropriately.

Second, BMS was concerned about the monkeys' potential exposure to asbestos dust. BMS has a large financial investment both in the monkeys and its drug testing. If the monkeys were exposed to asbestos, they would be considered compromised. Because the monkeys were housed in self-contained, environmentally controlled (HEPA filtrated) rooms within the facility, eventually BMS was able to determine, to a reasonable degree of certainty, that the monkeys had not been exposed or compromised.

Third, BMS had to address the continuation of the roofing job. At BMS's insistence, the roofing job was suspended until Somerville Fidelco retained an asbestos removal company, Slavco Construction, Inc. ("Slavco"), and developed a protocol to appropriately complete the roof removal portion of the roofing job.

Fourth, BMS had to address the asbestos contamination of the facility. The contamination was addressed in two phases. In October of 2005—after the roofing job had been suspended—BMS retained the services of Bristol Environmental, Inc. ("BEI") (no relation to BMS) to conduct a gross decontamination of the facility so that BMS could conduct limited operations at the facility. After the roofing job was completed in December of 2006, BEI conducted a more extensive cleanup of the facility which started in January and ended in March of 2007. (See Stipulation of Facts, ¶33).

Fifth, BMS had to address the impact that the asbestos contamination had on its operations. Although BMS was able to conduct operations on a reduced basis with employees wearing protective gear while the facility was contaminated, the contamination of the facility reduced the usable space at the facility.

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Somerville Fidelco's Liability¹

Somerville Fidelco's Liability For Badger's Negligence

Somerville Fidelco is liable to BMS for Badger's negligence in causing asbestos to infiltrate the Somerville Facility pursuant to Section 11.4 of the Lease, which provides that Somerville Fidelco has the right to enter the leased premises to make repairs and that:

The Landlord agrees to do all such work at all reasonable times during usual business hours and in connection with the doing of any such work to cause as little inconvenience, annoyance, disturbance, loss of business or other damage to the Tenant as may reasonably be possible in the circumstances, and in the event the Landlord shall cause any damage to Tenant's property or *if damage caused by Landlord's or its agent's or contractor's negligence, Landlord shall be liable for the damage.*

(Emphasis added).

In accordance with Section 112 of the Clean Air Act ("CAA"), the United States Environmental Protection Agency ("USEPA") established National Emissions Standards for Hazardous Air Pollutants ("NESHAP") to protect the public. *See* USEPA, *Common Questions on the Asbestos NESHAP*, available at <http://www.epa.gov/region04/air/asbestos/asbqa.htm>. In March 1971, the USEPA identified asbestos as a hazardous air pollutant, and in April 1973, the USEPA promulgated the Asbestos NESHAP (40 C.F.R. §61 *et seq.*). The Asbestos NESHAP protects the public by minimizing the release of asbestos fibers during activities involving the processing, handling, and disposal of ACM. Accordingly, the Asbestos NESHAP specifies written notification procedures and work practices that must be followed during demolitions and renovations² of all structures and commercial buildings. *See id.*

¹ BMS reserves the right to assert other bases of Somerville Fidelco's common law and statutory liability.

² "Renovation" is defined as "altering a facility or one or more facility components in any way, including the stripping or removal of [Regulated Asbestos Containing Material] from a facility component." 40 C.F.R. §61.141. "Operations in which load-supporting structural members are wrecked or taken out are demolitions." *Id.*

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The Asbestos NESHAP categorizes ACM as either “friable” or “nonfriable”.³ 40 C.F.R. §61, App. A to Subpart M, *Interpretive Rule Governing Roof Removal Operations*, at 1.1. “Nonfriable ACM is further classified as either Category I ACM or Category II ACM.” *See id.* at 1.2. Category I ACM includes asphalt roofing products containing more than 1% asbestos.⁴ Category II ACM includes all other nonfriable ACM, including, for example, asbestos-cement shingles containing more than 1% asbestos. *See id.*

The applicability of the Asbestos NESHAP to Category I and Category II ACM depends upon: (i) the condition of the material at the time of renovation; (ii) the nature of the ACM removal method; and, (iii) the amount of ACM involved. *See id.*

Category I and Category II ACM regulated under the Asbestos NESHAP may be further categorized as “regulated asbestos-containing material” (“RACM”). *Id.* at 1.3. “RACM includes: (1) friable ACM; (2) Category I nonfriable ACM that has become friable; (3) Category I nonfriable ACM that has or will be sanded, ground, cut, or abraded; [and,] (4) Category II nonfriable ACM that has . . . been . . . crumbled, pulverized, or reduced to powder.” *Id.*

For Category I ACM (asphalt roofing products), if the area of the roof to be removed is at least 160 square feet, the removal is subject to the Asbestos NESHAP *unless* “slicing,”⁵ or other methods that do not sand, grind, cut or abrade, are utilized to remove the ACM. *See* 40 C.F.R. §61, App. A to Subpart M, at 1.A.1.

For all Category II ACM, if the area of roof to be removed is at least 160 square feet, the removal is subject to the Asbestos NESHAP. *See* 40 C.F.R. §61, App. A to Subpart M at 1.A.2.

Persons conducting renovations that are subject to the Asbestos NESHAP must provide written notification of the renovation to the regulatory agencies at least 10

³ “Friable ACM is ACM that, when dry, can be crumbled, pulverized or reduced to powder by hand pressure.” 40 C.F.R. §61, App. A to Subpart M, at 1.1.

⁴ “Asphalt roofing products which may contain asbestos include built-up roofing; asphalt-containing single ply membrane systems; asphalt shingles; asphalt-containing under layment felts; asphalt-containing roof coatings and mastics; and, asphalt-containing base flashings.” *Id.* at 1.2.

⁵ “As EPA interprets the NESHAP, the use of certain manual methods (using equipment such as axes, hatchets, or knives, spud bars, pry bars, and shovels, but not saws) or methods that slice, shear or punch (using equipment such as a power slicer or power plow) do not constitute ‘cutting, sanding, grinding or abrading.’” *Id.* at 1.C.1.

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working days in advance of the renovation. *See* 40 C.F.R. §61, App. A to Subpart M at 2.1.

In accordance with the Asbestos NESHAP, notifications of demolition or renovation projects involving ACM must contain certain specified information, including the scheduled starting and completion date of the work; the location of the project site; the names of asbestos removal contractors; methods of removal; and, the amount of ACM involved in the demolition or renovation. *See* 40 C.F.R. §61.145(b). The USEPA has interpreted the Asbestos NESHAP to require that either the owner of the building or the operator of the demolition or renovation project must submit the required notification. *See* USEPA, *Common Questions on the Asbestos NESHAP*, available at <http://www.epa.gov/region04/air/asbestos/asbqa.htm>.

If roofing materials contain more than 1% asbestos and the renovation activity involves RACM covered by the Asbestos NESHAP (e.g., Category I nonfriable ACM that has become friable or Category I nonfriable ACM that has or will be sanded, ground, cut, or abraded), work practices described in 40 C.F.R. §61.145(c) must be followed. *See* 40 C.F.R. §61, App. A to Subpart M at 1.A.3. In general, 40 C.F.R. §61.145(c) requires that:

- All RACM must be removed from the facility “before any activity begins that would break up, dislodge, or similarly disturb the material or preclude access to the material for subsequent removal”;
- When facility components that contain RACM are being taken out of the facility as a unit or in sections, all RACM exposed during cutting or disjoining operations must be adequately wetted⁶ and carefully lowered to the ground, not dropping, throwing, sliding, or otherwise disturbing the RACM;
- If RACM is stripped from a facility component that remains in place, the RACM must be adequately wetted;
- All RACM material that has been removed or stripped must be adequately wetted, and it must remain wet until collected, contained and prepared for disposal;

⁶ In renovation operations, wetting is not required if: (a) the facility owner or operator has obtained prior written approval from the EPA based on a written application that wetting would unavoidably damage equipment or present a safety hazard; and, (b) the facility owner or operator uses various emissions controls described within the regulations. 40 C.F.R. §61.145(c)(3)(i).

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- No RACM may be stripped, removed, or otherwise handled or disturbed at a facility unless there is at least one on-site representative trained in the provisions of 40 C.F.R. §61.145 present at the facility.

40 C.F.R. §61.145(c) *et seq.*

When performing renovation activities involving RACM that are subject to the Asbestos NESHAP, the observation of dust from ACM materials may be used as evidence of a violation of the "adequately wet" requirement. *See* USEPA, *Asbestos/NESHAP Regulated Asbestos Containing Materials Guidance*, available at <http://www.epa.gov/region4/air/asbestos/asbmatl.htm>. Moreover, visible asbestos-containing debris on the ground outside the boundaries of a work site is considered a "visible emission," and a violation of the Asbestos NESHAP. *See id.*

In addition to the work practices that are prescribed in 40 C.F.R. §61.145(c), the Asbestos NESHAP requires that all material produced by the sanding, grinding, cutting, or abrading of Category I nonfriable ACM must be treated as asbestos-containing waste material subject to the waste handling and collection provisions of 40 C.F.R. §61.150. *See id.* That is, the debris from Category I nonfriable ACM that has been sanded, ground, cut or abraded must be collected and processed in a manner that either: (a) does not discharge visible emissions to the outside air; or, (b) cleans emissions containing particulate asbestos material before they escape to, or are vented to, the outside air. *See* 40 C.F.R. §61.150 *et seq.*

Similar to the USEPA's Asbestos NESHAP, the Occupational Safety and Health Administration's ("OSHA") Asbestos Standard for the Construction Industry (29 C.F.R. §1926.1101 *et seq.*) (hereinafter "OSHA Standard") regulates worker exposure to asbestos (both ACM and RACM) during the following construction⁷ activities:⁸ repairing, maintaining, or renovating asbestos-containing structures; and, cleaning up asbestos releases. 29 C.F.R. §1926.1101(a) *et seq.*

The OSHA Standard establishes a classification system for asbestos work and establishes mandatory work practices that must be followed to reduce exposures from each Class of asbestos work. The Classes of asbestos work established by the OSHA Standard are as follows:

⁷ Construction work means "work for construction, alteration, and/or repair, including painting and decorating" 29 C.F.R. §1910.12(b).

⁸ The list provided is not all inclusive. *See* 29 C.F.R. §1926.1101(a) *et seq.*

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Class I – Removal of asbestos-containing thermal system insulation (“TSI”) and sprayed-on or trowel on surfacing materials (“SM”).

Class II – Removal of other types of ACM that are not TSI, such as resilient floors or roofing materials.

Class III – Repair and maintenance operations where ACM or presumed asbestos-containing material is disturbed.

Class IV – Custodial activities where employees clean up ACM debris produced by construction, maintenance or repair activities.

See 29 C.F.R. §1926.1101(b) and Occupational Health and Safety Administration, U.S. Dept. of Labor, Pub. OSHA 3096, Asbestos Standard for the Construction Industry (2002) at 3.

The OSHA Standard establishes extensive minimum safety requirements for each Class of asbestos work. No matter what Class of asbestos work is being performed, the OSHA Standard establishes minimum requirements for the following: Permissible Exposure Limits (PELs);⁹ Initial Exposure Assessments & Negative Exposure Assessments;¹⁰ Regulated Areas & Warning Signs; Competent Persons;¹¹ Air Monitoring; Medical Surveillance; Respirators; Protective Clothing; Training; Decontamination; Engineering Controls; and, Permitted and Prohibited Work Practices. *See 29 C.F.R. §1926.1101 et seq.*

Further, *regardless of exposure levels*, the OSHA Standard requires that employers must use the following engineering controls and work practices for Class I, II, III, and IV work:

⁹ The PEL for airborne concentrations of asbestos is 0.1 f/cc as an 8-hour time weighted average (TWA). The Short Term Exposure Limit (“STEL”) is 1 f/cc as averaged over a sample period of 30 minutes. Occupational Health and Safety Administration, U.S. Dept. of Labor, Pub. OSHA 3096, *Asbestos Standard for the Construction Industry* (2002) at 4.

¹⁰ An Initial Exposure Assessment is conducted for purposes of estimating the concentration of asbestos that employees will be exposed to when the work is performed. A Negative Exposure Assessment (“NEI”) demonstrates that employee exposures during the operation are consistently below the PEL for asbestos. *Id.* at 5.

¹¹ Employers must designate a “Competent Person” to supervise all Classes of asbestos operations covered under the OSHA Standard. The Competent Person must be trained to identify asbestos hazards and be vested with the authority to correct them. A Competent Person must frequently inspect job sites, materials, and equipment. *Id.* at 4-5.

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- Vacuum cleaners equipped with HEPA (High Efficiency Particulate Air) filters to collect all asbestos-containing or presumed asbestos-containing debris and dust.
- Wet methods or wetting agents to control employee exposures except when infeasible (e.g., due to the creation of electrical hazards, equipment malfunction, and slipping hazards).
- Prompt cleanup and disposal in leak-tight containers of asbestos-contaminated wastes and debris.

See 29 C.F.R. §1926.1101(g)(1) *et seq.*; OSHA 3096, *Asbestos Standard for the Construction Industry* at 19.

In addition, the following work practices are prohibited for all asbestos-related work or work that disturbs ACM or presumed asbestos-containing materials, *regardless of measured exposure levels*:

- High speed abrasive disc saws not equipped with a point-of-cut ventilator or enclosure with HEPA-filtered exhaust air.
- Compressed air to remove asbestos or ACM.
- Dry sweeping, shoveling, or other dry cleanup of dust and debris.
- Employee rotation to reduce exposure.

OSHA 3096, *Asbestos Standard for the Construction Industry* at 20.

Under the OSHA Standard, persons who conduct Class IV work (i.e., the cleanup of ACM debris produced by construction, maintenance or repair activities) *must* have attended an asbestos awareness training program and they *must* use wet methods and HEPA vacuums to clean ACM or presumed asbestos-containing debris. See 29 C.F.R. §1926.1101(g)(10). Further, when cleaning debris and waste in "regulated areas,"¹² persons conducting Class IV work *must* wear respirators. See 29 C.F.R. §1926.1101(g)(10)(i).

When it comes to examining asbestos containing roofing materials and other surfacing materials that may contain asbestos, the USEPA recommends, *inter alia*, that:

¹² "A regulated area is a marked-off site where employees work with asbestos, including any adjoining areas where debris and waste from work accumulates or where airborne concentrations of asbestos exceed, or can possibly exceed, the PEL." *Id.* at 12.

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(a) building materials should be grouped into homogeneous areas based on uniformity of texture and color of the materials; and, (b) at least three cores samples should be obtained from each homogeneous area by selecting sampling locations that are representative of the homogeneous area. *See* USEPA Toxic Substances publication entitled *Guidance for Controlling Asbestos-Containing Materials in Buildings*, EPA560/5-85-024 (June 1985) at 2-6.

According to the USEPA, if asbestos is found, a control or abatement program should be initiated. *See id.* at 2-1. Further, the USEPA advises that:

“[w]henver the presence of asbestos is in doubt, prudence is recommended: *treat the material as if it contains asbestos.*” *Id.* at 2-4. (Emphasis added)

Identification of homogeneous areas is the first important step in the process of devising an asbestos control or abatement program (*see id.* at 6-6), however, it is “[t]he likelihood of fiber release from ACM that determines the need for and timing of additional action.” *Id.* at 4-1.

The USEPA advises that “[t]he likelihood of fiber release from ACM is based on evaluating [the] current condition [of the ACM] and the potential for future disturbance, damage, or erosion.” *Id.* According to the USEPA, “[a]ir monitoring alone should not be used for assessment.” *Id.* “For example, if [air] sampling is conducted for a short time during a quiet period (i.e., when air movement is limited), many fibers will settle out of the air onto the floor or other surfaces and may not be captured on the filter.” *Id.* at 6-5. Moreover, “assessment by air monitoring alone is not recommended because it reflects conditions only at the time of sampling.” *Id.* at 4-2. Air monitoring “provides no information about fiber release potential and future air levels.” *Id.* at 4-3.

The asbestos contamination at the Somerville Facility was caused by the negligence of Badger, who failed to comply with the Asbestos NESHAP, failed to comply with the OSHA Standard, and failed to follow sound industrial hygiene practices governing the removal of ACM and RACM at the Somerville Facility.

The work at the Somerville Facility that was performed by Badger, involved the removal of more than 160 square feet of Category I non-friable ACM (*see* Stipulation of Facts, ¶11). which, after it was reduced to dust, debris, and powder from having been abraded with a rotating blade Panther saw, became RACM that was subject to the Asbestos NESHAP. *See* 40 C.F.R. §61, App. A to Subpart M at 1.3. Moreover, as Badger’s work involved the removal of asbestos-containing roofing materials other than TSI, Badger’s work qualified as Class II asbestos work under the OSHA Standard. *See*

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29 C.F.R. §1926.1101(g); OSHA 3096, *Asbestos Standard for the Construction Industry* at 3.

Badger (which is *not* a licensed or qualified asbestos removal company) was negligent because it:

- Violated the Asbestos NESHAP¹³ by failing to provide ten (10) days advance notice of the roofing work involving the removal of ACM, or to ensure that the building owner, Somerville Fidelco, provided ten (10) days advance notice of the roofing work involving the removal of ACM. *See* 40 C.F.R. §61, App. A to Subpart M at 2.1. If the regulatory agencies had been notified that Badger intended to remove ACM and RACM without appropriate engineering controls and work practices, the regulatory agencies likely would not have permitted the removal to take place until specific engineering controls and work practices were implemented.
- Violated the Asbestos NESHAP when it failed to remove all RACM from the facility before commencing activities that would break-up or dislodge the materials. *See* 40 C.F.R. §61.145(c).
- Violated the Asbestos NESHAP when it failed to adequately wet, and carefully lower to the ground all RACM that was exposed during cutting or disjoining operations. *See* 40 C.F.R. §61.145(c). Indeed, BMS employees observed that work performed by Badger produced a large cloud of dust and debris. *See* USEPA, *Asbestos/NESHAP Regulated Asbestos Containing Materials Guidance* (observation of dust from ACM materials may be used as evidence of a violation of the "adequately wet" requirement and visible asbestos-containing debris on the ground outside the boundaries of a work site is considered a "visible emission," and a violation of the Asbestos NESHAP).
- Violated the Asbestos NESHAP when it failed to ensure that at least one on-site representative trained in the provisions of the Asbestos NESHAP was present at the Somerville Facility before any RACM was stripped, removed, or otherwise handled or disturbed. *See* 40 C.F.R. §61.145(c).

¹³

Under New Jersey law, non-compliance with applicable government regulations provides strong evidence of negligence. *See Constantino v. Ventriglia*, 324 N.J. Super. 437, 441 (App. Div. 1999), *certif. denied*, 163 N.J. 10 (2000); *Sanna v. National Sponge Co.*, 209 N.J. Super. 60, 69 (App. Div. 1986); *Shatz v. TEC Technical Co.*, 174 N.J. Super. 135, 143-44 (App. Div. 1980).

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- Violated the OSHA Standard¹⁴ when it failed to ensure the on-site presence of a properly trained "Competent Person" to supervise asbestos work. *See 29 C.F.R. §1926.1101(g)(7)(i) and OSHA, Asbestos Standard for the Construction Industry* at 4-5.
- Violated the OSHA Standard when it failed to perform an Initial Exposure Assessment or conduct a Negative Exposure Assessment. *See 29 C.F.R. §1926.1101(g)(7)(ii) and OSHA, Asbestos Standard for the Construction Industry* at 5. But for its attempts to wet down the materials, Badger did not take any precautions when handling the ACM at the Somerville Facility.
- Violated the OSHA Standard when it failed to provide cutting machine misting or HEPA filters for the Panther saw that it used to remove ACM materials from the roof of the Somerville Facility. *See 29 C.F.R. §1926.1101(g)(7)(iv) and OSHA, Asbestos Standard for the Construction Industry* at 20.
- Failed to inquire of Somerville Fidelco about the existence of, or need for, core samples to determine whether ACM was present within the roofing materials at the Somerville Facility. Although Badger is aware that roofing materials can and do contain asbestos, Badger never asked Somerville Fidelco about the presence of ACM in the roofing materials at the Somerville Facility. (*See Stipulation of Facts, ¶¶18, 19*). As Badger has acknowledged, if it knew that the roofing materials contained asbestos, it would have either subcontracted the roof removal phase of the project to a qualified asbestos removal contractor or retained an expert to develop an asbestos removal protocol for Badger to follow.

As a result of its negligence, Badger inappropriately proceeded with the roofing job as if ACM was not present, failed to implement EPA and OSHA removal measures, and caused asbestos and ACM to infiltrate the Somerville facility.

¹⁴

See supra n.13. *See also 29 C.F.R. §1926.1101(d)(2)* ("Asbestos hazards at a multi-employer work site shall be abated by the contractor who created or controls the source of asbestos contamination."); *Universal Constr. Co., Inc. v. Occupational Safety & Health Review Comm'n*, 182 F.3d 726, 730 (10th Cir. 1999) ("[T]he general rule regarding multi-employer construction worksites is that employers will be liable under [the Occupational Safety and Health Act ("Act")] for hazards the employer either created or controlled, regardless of whose employees are threatened by the hazard. Thus, a subcontractor that creates a hazard may be cited under [the Act] even if its own employees are not threatened." (emphasis added)).

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Somerville Fidelco's Negligence

Somerville Fidelco also is liable to BMS for Somerville Fidelco's negligence in connection with the asbestos incident at the Somerville Facility pursuant to Section 11.4 of the Lease, which provides that Somerville Fidelco has the right to enter the leased premises to make repairs and that:

The Landlord agrees to do all such work at all reasonable times during usual business hours and in connection with the doing of any such work to cause as little inconvenience, annoyance, disturbance, loss of business or other damage to the Tenant as may reasonably be possible in the circumstances, and in the event the Landlord shall cause any damage to Tenant's property or *if damage caused by Landlord's or its agent's or contractor's negligence, Landlord shall be liable for the damage.*

(Emphasis added).

Somerville Fidelco was negligent because it:

- Violated the Asbestos NESHAP by failing to provide ten (10) days advance notice of the roofing work involving the removal of ACM, or to ensure that its contractor, Badger, provided ten (10) days advance notice of the roofing work involving the removal of ACM. *See* 40 C.F.R. §61, App. A to Subpart M at 2.1.
- Violated the OSHA Standard by failing to inform BMS of the presence, location, and quantity of ACM or presumed asbestos-containing materials at the Somerville Facility. *See* 29 C.F.R. §1926.1101(k)(2)(ii)(D) and OSHA STANDARD INTERPRETATION LETTER, *Building and/or Facility Owner Notification Requirements* (Feb. 1996) available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22084.
- Violated the OSHA Standard by failing to inform BMS that, when Badger was hired to repair and replace the roof of the Somerville Facility, work that was subject to the OSHA Standard was about to take place. *See* 29 C.F.R. §1926.1101(k)(2)(ii)(D) and OSHA STANDARD INTERPRETATION LETTER, *Building and/or Facility Owner Notification Requirements* (Feb. 1996). Rather, Somerville Fidelco's contractor, Badger, simply informed BMS that Badger would be removing the roof of the Somerville Facility and, therefore, BMS could expect to have some dust enter the facility.

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- Failed to survey and inspect the Somerville Facility for the presence of ACM and presumed asbestos-containing materials. *See* USEPA *Guidance for Controlling Asbestos-Containing Materials in Buildings* at 2-1. Somerville Fidelco failed to survey and inspect the Somerville Facility for the presence of ACM and presumed asbestos-containing materials, despite the fact that it commissioned the HHL Report which recommended that core samples be taken from the roof.
- Violated the OSHA Standard by failing to notify Badger about the presence, location, and quantity of ACM or presumed asbestos-containing materials in the areas of the building or facility where Badger performed its work. *See* 29 C.F.R. §1926.1101(k)(2)(ii)(B) and OSHA STANDARD INTERPRETATION LETTER, *Building and/or Facility Owner Notification Requirements* (Feb. 1996). Indeed, Somerville Fidelco did not inform Badger that the HHL Report that was commissioned by Somerville Fidelco recommended that the roof of the Somerville Facility be tested for asbestos. (*See* Stipulation of Facts, ¶16, 17).

As a result of Somerville Fidelco's negligence, Badger proceeded with the roofing job as if ACM was not present, failed to implement EPA and OSHA required removal measures and protections, and caused asbestos and ACM to infiltrate the Somerville facility.

**Somerville Fidelco's Liability For The Asbestos Contamination
As A "Casualty" Under The Lease**

Moreover, regardless of whether or not Somerville Fidelco or Badger was negligent, Somerville Fidelco is liable under the Lease because the asbestos infiltration caused by Badger constitutes a "casualty" under the Lease, for which Somerville Fidelco has assumed liability.

Sections 22.2 and 22.3 of the Lease provide that if the lease premises are "damaged by fire, explosion *or other casualty*, Landlord shall as soon as reasonable proceed to repair such damage" and that "[i]n the event of the damage or destruction of the demised premises by fire or other cause, Landlord will promptly repair and restore, as the case may be, the premises so that the premises after such work shall be substantially the same as prior to such damage." (Emphasis added).

The term "casualty" means a "fortuitous" event or an event by "chance" or "accident." *See Compagnie Des Bauxites De Guinee v. Insurance Co. of N. Am.*, 724 F.2d 369, 372 (3rd Cir. 1983); *Faron v. Penn Mut. Life Ins. Co.*, 179 F.2d 480, 482 (3rd Cir. 1950); *Morton Thiokol, Inc. v. General Accident Ins. Co. of Am.*, 1987 N.J. Super. LEXIS 1487, slip op. at *10 (Ch. Div. 1987).

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The asbestos infiltration caused by Badger's roofing work constitutes a "casualty" within the meaning of the Lease. *See Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3rd Cir. 2002); *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997); *David Danzeisen Realty Corp. v. Continental Ins. Co.*, 170 A.D.2d 432, 565 N.Y.S.2d 223 (2nd Dept. 1991). For example, in *David Danzeisen*, a court held that damage caused by a roofing contractor was a "fortuitous" event and therefore covered under a property insurance policy. The insurer disclaimed coverage, contending that the loss was not fortuitous. The court disagreed, finding that the plaintiff had relied upon a roofing contractor "to do whatever was necessary to properly complete the job," that the loss caused by the contractor was "to a substantial extent beyond (plaintiff's) control" and, therefore, a fortuitous event covered under the insurance policy. *David Danzeisen*, 170 A.D.2d at 432, 565 N.Y.S.2d 224.

BMS's Damages

Pursuant to the terms of the Lease, an arbitration award should be entered in favor of BMS and against Somerville Fidelco for a total of \$746,191 broken down as follows:

- \$449,981 for costs incurred by BMS to decontaminate the Somerville Facility;
- \$224,210 for animal care and lodging costs incurred by BMS when monkeys that had been purchased and released for delivery by a Texas vendor had to be detained at the vendor while the Somerville Facility was contaminated; and
- \$72,000 for a rent abatement during the six month period (October 2005 through March 2006) that BMS had limited use of the facility while the facility was contaminated.

BMS's Asbestos Cleanup Costs

Pursuant to Sections 11.4, 22.2 and 22.3 of the Lease, Somerville Fidelco is liable for the cleanup costs (totaling \$449,981) incurred by BMS to decontaminate the Somerville facility. These costs are summarized on the Chart annexed hereto at Tab C in items 2 through 16.

The cleanup of dust and debris within the Somerville Facility was governed by the requirements of the OSHA Standard that pertain to Class IV asbestos work and the cleanup authorized by BMS was reasonable, appropriate, and necessary. Under the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* ("CERCLA"), friable and non-friable asbestos-containing roofing debris and dust are considered hazardous substances, the release of which must

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be contained and cleaned up in order to minimize the hazards of exposure. See 40 C.F.R. §302.4. See also USEPA, *Monthly Hotline Report, RCRA, Superfund and EPCRA* (Oct. 1996) available at <http://www.epa.gov/epaoswer/hotline/96report/oct.txt> ("Although releases of non-friable asbestos are exempt from release notification requirements, such releases are still subject to CERCLA response and liability provisions"). Because test results confirmed that the dust and roofing debris that entered the facility as a result of Badger's roofing work contained friable asbestos, all dust and roofing debris that entered the facility needed to be contained and cleaned up in order to prevent the building occupants from being exposed to, and redistributing, the materials.

Pursuant to EPA guidance, after it has been confirmed that building materials at a facility contain asbestos, all building materials at a facility that are of the same sort, texture, and color as the confirmed asbestos-containing materials should be presumed to be asbestos-containing materials. See USEPA Toxic Substances publication entitled *Guidance for Controlling Asbestos-Containing Materials in Buildings*, EPA560/5-85-024 (June 1985). Moreover, because of the impracticality of sampling every piece of dust and roofing debris that entered the facility, it was appropriate for BMS to approve a scope of work that required BEI to treat all of the dust and debris that entered the facility as though they were materials that contained asbestos that was, or could be, rendered friable.

BMS's Animal Care and Lodging Costs

Pursuant to Section 11.4 of the Lease, Somerville Fidelco is also liable for the animal care and lodging costs that BMS incurred because monkeys that were already purchased and released for delivery had to be detained at BMS's Texas vendor. These costs (totaling \$224,210) are summarized on the Chart annexed at Tab C in item 1 ("BRF Monkey Boarding").

After quarantine, monkeys are shipped from the Somerville Facility to other BMS facilities where they participate in medical trials. As monkeys are shipped out for medical trials, new monkeys are received from Texas. In order to maintain a monkey census that would be sufficient to meet demand for 2006, BMS normally would have received shipments of approximately 100 monkeys in both the third and fourth quarters of 2005. This, however, did not happen. Shipments of new monkeys were not received at the Somerville Facility during the later half of September 2005 and the fourth quarter of 2005 because dust and debris from asbestos-containing roofing materials had infiltrated the Somerville Facility and created a risk of exposure to both the monkeys and the personnel who were resident at the Somerville Facility. All the while, the remaining monkeys were shuffled from room to room within the Somerville Facility so as to accommodate on-going cleanup activities.

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Rent Abatement

Pursuant to Sections 11.4 and 22.3 of the Lease, BMS should also be awarded a rent abatement equal to two-thirds (\$12,000 per month) of the monthly rent of \$18,000 for the six-month period (October 2005 through March 2006) that BMS had limited use of the facility while the facility was contaminated.

Under Section 11.4 of the Lease, Somerville Fidelco is generally liable for damage caused to BMS as a result of Somerville Fidelco's and/or Badger's negligence. Moreover, under Section 22.3 of the Lease, BMS is entitled to a rent abatement regardless of whether or not Somerville Fidelco and Badger were negligent. Section 22.3 provides in this regard that:

If the premises should be thus rendered untenable, the rent shall abate until the premises can again be used for *Tenant's usual business*. . . . In the event that the demised premises shall be partially damaged or destroyed by fire or other cause so as effectively to limit the use of a portion of the premises for the business of Tenant then the rent shall *abate in proportion to the size of the area rendered untenable* until such time as effective use of said area is restored. (Emphasis added)

Pursuant to this provision, BMS should be awarded a partial rent abatement for the six-month period that it had reduced use of the facility. *See Neurology Servs., Inc. v. Fairfax Medical PWH, LLC*, 67 Va. Cir. 1 (2005)(complaint alleging that landlord's contractors caused asbestos contamination of the tenant's medical office stated viable claim that landlord had breached the leased and that tenant had been deprived of beneficial use of the facility for its intended purpose); *see also SunAmerica Fin., Inc. v. 260 Peachtree Street, Inc.*, 415 S.E.2d 677 (Ga. Ct. App. 1992)(presence of asbestos in leased premises breached leased and resulted in constructive eviction), *cert. denied*, 1992 GALEXIS 306 (1992).

BMS Is Not Financially Responsible Under The Lease For The Roof Repair Costs Incurred By Somerville Fidelco

In this arbitration, Somerville Fidelco has improperly asserted a setoff defense (but no counterclaim) seeking to setoff the costs it incurred for the roof repairs against any damages that may be awarded to BMS.

The landlord's and tenant's repair obligations are governed by Section 5.1 of the Lease (entitled "Repairs"). This Section provides that Somerville Fidelco "shall make the necessary structural repairs to the roof and walls of the building of which the Premises

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are a part (such obligation not to include operating parts such as overhead ducts or fans or skylights)” and that BMS is responsible for other repairs.

As noted above, the history of roof leaks at this facility dates back to at least 1996. At no time, did Somerville Fidelco ever expense any roof repair costs (including any of the repair costs at issue in this arbitration) to BMS.

Somerville Fidelco’s financial responsibility for “structural repairs to the roof” extends to the replacement of the roof membrane at issue. “Structural repairs to the roof” refers to the whole of the roof, not just to the portions of the roof that are structural elements of the building. While the roofing membrane is not a structural member of the building, it is a component of the structure of the roof, which as a whole includes the supporting structural framework, the decking, the insulation, and the waterproofing membrane, together with its flashing and curbs.

Courts have generally recognized that the replacement of a roof is a landlord’s responsibility, not a tenant’s responsibility. See *Supervalu Operations, Inc. v. Center Design, Inc.*, 206 W.Va. 311, 524 S.E. 2d 666 (W. Va. 1999); *Kalus v. Food Fair, Inc.*, 220 Va. 529, 260 S.E. 2d 212 (Va. 1979); *Reed v. Classified Parking System*, 232 So. 2d 103 (La. App.), cert. den., 234 So. 2d 194 (La. 1970); *Dolid v. Leatherkraft Corp.*, 39 N.J. Super. 194 (App. Div. 1956). In fact, the notion of a tenant having financial responsibility for a substantial improvement such as the replacement of a roof is so unusual and counterintuitive that courts have declined to assign such responsibility to a tenant in the absence of explicit lease language delegating such a responsibility to a tenant. See *ASP Props. Group v. Fard, Inc.*, 133 Cal. App. 4th 1257, 1274, 35 Cal. Rptr. 3d 343, 355 (4th Dist. 2005); *Sandelman v. Buckeye Realty, Inc.*, 216 Ill. App. 3d 226, 230, 576 N.E. 2d 1038, 1040 (1st Dist.), appeal denied, 42 Ill. 2d 665, 584 N.E.2d 139 (1991).

Somerville Fidelco’s position that BMS is financially responsible for the roof replacement is belied by the facts that: (i) BMS had no involvement in the selection of Badger as a contractor for the roof replacement; (ii) Somerville Fidelco never provided BMS with any estimates for the cost of replacing the roof; (iii) Somerville Fidelco never sought BMS’s approval of the roof replacement costs; and, (iv) the roof replacement primarily benefited Somerville Fidelco, as the building owner, inasmuch as the roof replacement is warranted for 20 years and BMS’s lease is due to expire 3 years into that warranty period.

Somerville Fidelco’s defense for a setoff of its roofing expenses against any damages that may be awarded to BMS is a contrived position. Until BMS requested compensation from Somerville Fidelco for the damages caused by the asbestos incident, Somerville Fidelco

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had never taken the position that BMS had any financial responsibility under the Lease for any roof repairs.

In addition to the materials referenced above, we have enclosed at Tabs 1 through 30 the legal authorities referenced in this letter.

Sincerely yours,



Charles J. Vinicombe

Enclosures

CJV/sds

cc: Lawrence P. Maher, Esq.
(via federal express with enclosures)